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No. _____

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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

JERRY LOWERY,

Petitioner,

v.

T.E. REDD, Individually and in his official capacity as a police officer; and LARRY STOVALL, Individually and in his official capacity as a police officer.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH U. S. CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

I. **Whether a criminal conviction in state court upon a guilty plea precludes a brain-damaged defendant from seeking to recover damages under 42 U.S.C. § 1983 for an alleged Fourth Amendment violation of excessive force that was never considered in the state proceedings.**

II. **Whether a federal trial judge should be empowered by the controversial doctrine of Judicial Estoppel (which is a minority viewpoint among federal courts) to summarily dismiss pre-trial, without any evidentiary hearing, plaintiff's Constitutional civil claims of excessive force?**

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Respondents.	)	

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH U. S. CIRCUIT COURT OF APPEALS

Jerry Lowery, petitioner, by counsel, prays this honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court's pre-trial dismissal on the basis of a judicial estoppel of this 42 U.S.C. § 1983 case. The Petitioner asserts fundamental legal error in that the decisions below failed to consider that the pivotal issue of excessive force, as claimed by Petitioner, was never considered nor in any way litigated in the state criminal proceedings.

The petitioner strongly challenges the applicability of the controversial doctrine of judicial estoppel as it contravenes and sweeps away existing case law of this most Honorable Supreme Court, especially when entered pre-trial without any evidentiary hearing such as to deny Petitioner basic constitutional due process.

The petitioner also challenges as plainly wrong and constituting clear error the Fourth Circuit's decision not to distinguish or to follow the mandate of this Court decision in Haring v. Prosise, 462 U.S. 306 (1983).

OPINION BELOW

The opinion of the Fourth Circuit below is Lowery v. Stovall et al., No. 95-1729, 1996 WL 439236 (4th Cir. Aug 6, 1996). **App. at A-1.**

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The opinion and judgment of the Fourth Circuit were entered August 6, 1996. **App. at A-1.** The Fourth Circuit denied rehearing and the suggestion for rehearing en banc September 5, 1996. **App. at A-20.**

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, an citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .

This case further involves 42 U.S.C. § 1985, which provides in relevant part:

> If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . .; in any case of conspiracy set forth in this

> section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person . . . or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Also involved is the Fourth Amendment to the Constitution of the United States, which provides in part, "The right of the people to be secure in their persons . . . shall not be violated . . . ."

Finally, this case involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Petitioner seeks review of a published three-Panel ("Panel") decision of the Fourth U. S. Circuit Court of Appeals. It arises from an incident in the dark, early morning hours of February 1, 1991 when Defendant Stovall, a South Boston police officer, shot Lowery, an unarmed motorist, in the brain from the rear during a routine traffic stop conducted by Defendants Stovall and Redd. It was alleged that Lowery, of average size and weight and armed only with a two-inch black plastic key holder [Picture of key holder at **A-101**], attacked two armed police officers, one of whom was a former marine heavyweight boxing champion who stood 6'2", 210 lbs., 38 years of age, and who regularly bench pressed 220 lbs.

The South Boston police force at the time of this shooting consisted of only 12 officers. Three of the officers were on duty when Lowery was first stopped. Officer Redd determined that Lowery appeared lost and thus allowed him to leave without even checking his identity. It is undisputed that Lowery was unknown to the police and did not in any way appear intoxicated nor under the influence of drugs.

Next, the three police officers drove to the deserted parking lot of a nearby funeral home and called in a status check of Lowery's automobile license plate. They allege learning that the driver's license of the owner of the vehicle (a Mr. Jerry Lowery) had been suspended. There is a dispute as to what the police discussed although Petitioner submitted below sworn affidavits of two citizens who heard the conversations on a police scanner. **[A-86 to A-92]** They heard officers, identified as Stovall and Redd by badge or call numbers, state that they were going to find Lowery and "fix him" and "mess [him] up."

Lowery was thereafter stopped once again in a parking lot of an apartment complex. A passenger was seen by the officers running away from the Lowery vehicle with a brown paper bag.

Lowery remained and was told that the officers needed to issue him a traffic summons for driving on a suspended permit. When he asked why the permit was listed as suspended, the two armed police officers invited him to sit in the front seat of Redd's four-door police cruiser while they attempted to get a further report from the DMV.

While both officers testified that Lowery entered and exited their vehicle on several occasions cursing at them, they saw no reason whatsoever to pat him down as he appeared neither armed nor dangerous. A significant dispute as to material facts arises at this point. The officers claim that after Lowery reentered the front passenger seat of the police vehicle for the third time, with Redd in front and a muscular Stovall in the rear, that Redd decided to reach over while all were seated and pat Lowery's pants pockets. All doors to the vehicle were closed.

Redd and Stovall claim Lowery, somehow in a seated position, was able to put his right hand into his left pocket and remove an object which they could not see. They next claim Lowery lunged at Redd "slashing his face and body." Stovall, seated behind Lowery, had a blackjack but decided not to use it. Instead, he decided to quick-draw his gun allegedly in response to Lowery turning around to attack Stovall. Stovall maintains there was a shiny object and that he heard Redd say knife. Even though Stovall admitted grabbing Lowery's right hand which apparently stopped the so-called attack, he nonetheless shot Lowery at point-blank range while the two faced each other.

Although Lowery suffers from significant and permanent cognitive deficits from the brutal shooting, he does recall certain incidents which stand in sharp contrast to the version of the events advanced by the officers. Lowery recalls emptying his pockets outside of the police vehicle when Stovall approached from his left rear at which time Stovall's weapon

fired. Lowery claims that he began to shake [the onset of shock] and crawled back into the passenger seat of the vehicle where he placed his head and where the only blood within the vehicle was found. Lowery claimed the officers grabbed him at this point, and he recalls grabbing Redd's face and scratching it with his fingernails while struggling to return to the police vehicle where it was warm, this being a cold winter night.

The facts are in material dispute as to the shooting. Moreover, Redd and Stovall completely contradict each other as to whether Lowery re-entered the vehicle. Stovall said that they did not allow this to happen. Redd, on the other hand, was clear that they did allow Lowery to crawl back into the vehicle.

There was no knife nor weapon of any kind, only a two-inch black plastic hideaway key holder which was found lying nearby. **[Picture at A-101]** Pictures of Redd at the scene show him to be neatly dressed, tie in place, with the only mark anywhere on his body being an obvious fingernail scratch to his left cheek which did not require any treatment. Of special note was that no blood was found on either officer even though they claim to have been wrestling with Lowery during the shooting including that Lowery had supposedly slumped over onto Redd after the shooting. Likewise, there was a total absence of blood anywhere on the ceiling dome of the vehicle where the police claim they shot Lowery, nor anywhere else inside the vehicle except the front seat where Lowery placed his head after the shooting.

Pre-trial evidence established that Stovall was a disciplinary problem, having previously threatened violence to citizens and having previously lied to a superior officer. In fact, Stovall has since been convicted of a felony of stealing drug task force monies. [See generally affidavit of D. P. van Blaricom at **A-55**.]

The hometown prosecutor, Mr. John E. Greenbacker, Jr., without disqualifying himself and without any independent investigation, immediately within 48 hours cleared his police officer friends of any wrongdoing. Greenbacker, an elected local official, then initiated boastful comments to the press all while Lowery was undergoing critical brain trauma surgery from this brutal and unjustified shooting. After this federal civil suit was filed, Greenbacker hauled Lowery before the state criminal court commenting to the press this time that the civil suit was "frivolous." **[A-94]**

Initially, Lowery was found incompetent to assist in his criminal defense due to his brain damage from Stovall's bullet. Almost two years later, the same prosecutor again resurrected the criminal case. Thereafter, Greenbacker (who was now in regular communication with Mr. John O'Brion, the insurance civil attorney for the police) used the state criminal process to coerce a bizarre plea bargain statement of facts from a brain-damaged Lowery, then represented by a young court-appointed attorney. The plea bargain statement of facts in that criminal proceeding did not, however, in any way address the issue of excessive force. Nonetheless, it was upon this document the Federal judge relied for the purposes of evoking judicial estoppel.

The uncontradicted medical testimony by Lowery's brain-trauma physician, is that Lowery was shot from his left rear side (and not from the front as alleged by Stovall and Redd), suffered permanent brain damage to his left temporal lobe from this massive head injury, and that he has significant and permanent deficits. **[A-62 to A-76]** Nonetheless, the Federal judge below ruled, without any evidentiary hearing as otherwise specifically requested by Appellant's counsel **[A-95-97]**, that Lowery, whom he had never seen nor questioned, was somehow playing "fast and loose" with the judicial system. With this observation, he granted Summary Judgment pre-trial to Stovall and Redd based upon the minority doctrine of judicial

estoppel. This principal, although **considered to be "out of harmony with the great weight of authority. . . ."** United States v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1986) is now embraced by the published opinion of the three-judge panel of the Fourth Circuit.

PREFACE - A MESSAGE FROM JERRY LOWERY

Jerry Lowery requests this Court to hear and observe him as he appeared for his criminal arraignment before the State trial court on September 15, 1994:

EXCERPTS -- STATE CRIMINAL COURT ARRAIGNMENT

The Court:	**Mr. Lowery, I'm asking you if you're waiving your right to a jury trial and electing to submit your case to the Court sitting without a jury.**
Mr. Crowder:	**The Court is asking you whether or not you want to be tried by a Judge or by a jury.**
Defendant Lowery:	**By a jury? I don't know; by a jury, I think.**
The Court:	**What's he saying?**
Mr. Crowder;	**Judge, he said by a jury he thinks.**
...	...
Mr. Crowder:	**Judge, can I carry him to the side for a minute?**
...	...

Mr. Crowder: I think we had just started the questioning, Judge, about whether Mr. Lowery wanted to be tried by a Judge or by a jury.

The Court: All right, Mr. Lowery, what do you say to that question?

Defendant Lowery: I say, do we have to have a jury? (Inaudible)

The Court: I'm not hearing him.

Mr. Crowder: I think he's asking if he has to have a jury, Judge.

The Court: No, he doesn't have to have a jury. I'm asking you, I'm telling you that you have a right to a jury but you do not have to have one, no. You can give up that right and have your case tried by me as the Judge sitting without a jury. Is that what you want to do?

Defendant Lowery: I guess. I don't know anything about it, so I'll just take that, I guess.

... ...

The Court: All right, now, you are ready for trial?

Defendant Lowery: I don't know if I'm ready or not.

The Court: Are you ready for trial, Mr. Crowder?

... ...

Defendant Lowery: **But nobody told me, nobody talked to me about exactly the way we're doing now. Nobody talked to me. They just hadn't talked where I was locked up; just haven't talked to me. They just hadn't talked to me and I'd just like to, you know, a little time to make sure. And I just don't know what to do right now. But a couple of days, a couple of weeks probably I would know after talking with my family and stuff. I just don't know right now.**

The Court: **Mr. Crowder, let me see you and Mr. Greenbacker in chambers.**

(Whereupon, counsel and the Court adjourned to chambers. Later in the afternoon a guilty plea was entered, which transcript has been prepared)

[A-38 to A-42].

MEDICAL NOTE

Lowery's brain damage and injuries from the shooting, well-known to the hometown prosecutor, included partial deafness with injuries to cranial nerves vii, viii, ix, x, xi, xii as well as the following:

1) "Hematoma of the anterior left temporal lobe";
2) "Complete blowout fracture of the left mandibular joint";
3) "Complete blowout fracture of the floor of the middle fossa on the left";
4) "The bullet had ricocheted off the anterior clinoid process and had

subsequently going down the neck to lie anterior to the vertebral column";

5) "The entrance wound was three centimeters above the left temporal mandibular joint";

6) "The dura was macerated infralaterally in the mid-portion of the temporal region as well as down along the floor of the middle fossa."

See Attached Medical Illustrations, also at **A-100** which was identified by Lowery's treating brain trauma specialist, Dr. Stonnington, as representing the path of the bullet as well as the medical damages resulting therefrom. [See also **A-62 to A-76**]

Defendant has yet to offer any medical witness to refute the above. Likewise, the defense has also failed to introduce any documents that would even remotely suggest that Mr. Lowery does not have permanent brain damage which interferes with his reasoning and logic as well as aspects of his memory.

ARGUMENT

By a single stroke of the pen, the Federal district judge, without any evidentiary hearing, swept aside long-standing Constitutional safeguards, including fundamental principals guaranteed by the Fourth and Fourteenth Amendment. By granting summary judgment pre-trial, the District Court found that it did not need to resolve the conflicting versions of the shooting because Lowery was precluded by the doctrine of judicial estoppel from presenting his case because of the criminal plea in state court. Because the District Court precluded Lowery from disputing critical and contested factual issues in this 42 U.S.C. § 1983 excessive force civil case, it held that the officers were entitled to qualified immunity.

The Fourth Circuit Panel ("Panel") incorrectly decided, in part, (1) that the state criminal trial judge specifically relied upon "The Statement of Facts" and meticulously reviewed Lowery's "position;" (2) that Lowery understood the "position;" (3) that Lowery initiated the "Statement" and misled the Court; and (4) that a brain-damaged Lowery was somehow playing "fast and loose" with the judicial system even though he had pled guilty to every major felony charged by the hometown prosecutor. But for judicial estoppel, the Fourth Circuit did specifically note that Lowery's "allegations, if true, constitute[d] a violation of his clearly established rights." [Opinion at **A-9**].

A quick perspective on the origin of estoppel is warranted. Dating back to common law before the enactment of modern rules, estoppel was equated with res judicata and variously referred to as issue preclusion and/or collateral estoppel. It was generally applied where a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction...cannot be disputed in a subsequent suit between the same parties or their privies. . . ." Southern Pacific R. Co. v. United States, 168 U.S. 1 (1897).

Essentially, three estoppel elements must be established. First, that the issues in the two judicial proceedings be the same. Second, the party to be estopped must have had a fair and full opportunity to have proven his claim or otherwise fully litigated the issue in the first proceeding and failed in that effort. And third, there must be mutuality of the parties in both proceedings. While there has been some erosion of the mutuality requirement in federal courts, it nonetheless remains a significant consideration within the Commonwealth of Virginia. Aetna Casualty and Surety Co. v. Anderson, 200 Va. 385, 105 S.E.2d 869 (1958).

Within the several federal courts that still recognize estoppel, two elements nonetheless remain constant. The identity of the issues and "...that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." Allen v. McCurry, 449 U.S. 90, 95 (1980) citing Montana v. United States, 440 U.S. 147, 153 (1979). See also Haring v. Prosise, 462 U.S. 306 (1983); Martin v. Wilks, 490 U.S. 75 (1989); U.S. v. Stauffer, 464 U.S. 165 (1984); and U.S. v. Mendoza, 464 U.S. 154 (1984).

As the issue of excessive force by Stovall and Redd as to Lowery was never litigated nor considered in the state criminal proceedings and because the issues in the criminal proceeding were different than those to be litigated in the federal § 1983 action, the application of estoppel in the instant matter stands as clear and reversible error. Other reasons supporting a grant of this writ, including the failure of the courts below to follow the mandate of Haring v. Prosise, 462 U.S. 306 (1983), are set forth.

A. Judicial estoppel has been improperly applied below.

In its review of judicial estoppel, the Panel, quoting from other cases, correctly noted the following:

1). "..., some circuits and jurisdictions have never recognized the doctrine."

2). "The specific requirements, however, are 'rather vague'...".

3). That judicial estoppel may be applied in narrow situations "when a party attempts to assert a position that is inconsistent with a prior position that the party has successfully asserted in another Court, ..." [Emphasis added]

4). That "Judicial estoppel is properly defined as a bar against the alteration of a factual assertion that is inconsistent with a position sworn to and benefitted from in an earlier proceeding."

5). That "the prior inconsistent position must have been accepted '(and relied upon)' by the Court." [Emphasis added]

6). That there must be "insistence" that "a Court having accepted the party's prior inconsistent position insures that judicial estoppel is applied in the narrowest of circumstances."

7). In adopting judicial estoppel, a Court must also find that "the necessity of protecting judicial integrity outweighs the ramifications of that protection upon the litigant and the judicial system."

8). "Because of the harsh results attendant with precluding a party from asserting a position that would normally be available to the party, judicial estoppel must be applied with caution."

9). **"Finally, the party sought to be estopped must have 'intentionally mislead the Court to gain unfair advantage.'"**

Lowery v. Stovall, No. 95-1729, 1996 WL 439236, at *4 (4th Cir. Aug. 6, 1996).

None of these essential elements of estoppel apply to Lowery's case. As an example, **Lowery never initiated** nor insisted upon and indeed never **created, drafted or wrote** the so called "Statements of Fact". The burden to prove otherwise rests with Defendants. "The burden is on the party asserting collateral estoppel to establish its predicates, and this of course includes presenting an adequate record for the purpose." Allen v. Zurich Insurance Company, 676 F.2d 1162, 1166 (4th Cir. 1982).

> **An "...earlier assertion of a legally irrelevant, albeit inconsistent, position should seldom, if ever, lead to the application of judicial estoppel..." Id. at 1167, citing Gleason v. U.S., 458 F.2d 171, 175 (3rd Cir. 1972).**

Accordingly, since the prosecutor's **"Statement of Facts,"** cited by the Panel as the basis for its opinion, was both **"legally irrelevant" and collateral** to Lowery's criminal arraignment and guilty pleas before the state court; was never relied upon by the state court as to its findings of guilt; did not involve the defendant police officers as parties; and thus has never caused Defendants to change their position or in any way be prejudiced, it would be fundamental error to use that bogus document as a basis for judicial estoppel.

At most, the subject statement of facts prepared by the criminal prosecutor may become an evidentiary item for the civil jury's consideration. See John S. Clark Company v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995); Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956); Konstantinidis v. Chen, 626 F.2d 933, 938 (D.C. Cir.

1980); and U. S. v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1986). See also Fed. R. Evid. 607 and 613 [witness impeachment and prior inconsistent statements].

B. The Statement of Facts was never relied upon by the trial court:

The Statement of Facts, otherwise considered "the prior inconsistent position", was never judicially relied upon by the trial court with regard to it's basis for accepting Lowery's plea of guilty. This is clearly evident in the trial transcript at pages 22 and 23, where the state court addressed Lowery as to final judgment and said as follows:

> **"All right, then, Mr. Lowery; then on your plea of guilty to these two charges, and the Court now having heard a summary of the evidence by the officer, I find that you are in fact guilty of each charge. . . ." App. 678.**

The Statement of Facts was simply marked "filed" by the trial court. **[A-98]**

The criminal court **at no time** based its finding of guilt on the statement. **It simply did not rely on the statement signed by Mr. Lowery in making its guilty determination.** It read the document to Lowery, as urged by Greenbacker, and then simply marked it "Filed." Thus, this document does not meet the test required to invoke judicial estoppel; that is, the document, as representing the prior inconsistent position, was never relied upon by the state court with regard to its findings.

The Panel observed that one of the several essential requirements of estoppel was judicial acceptance in the criminal case of the same material issue sought to be litigated in the subsequent proceeding. Stated differently, whether the state trial judge "accepted Lowery's prior inconsistent position."

"Judicial acceptance means that the first Court has adopted the position urged by the party... as part of a final disposition." Lowery at *6 (emphasis added).

The Panel, unfortunately, overlooked that **at no time whatsoever** did Lowery or his public defender ever urge the trial court to adopt the position set forth in the "Statement of Facts" **nor did the trial court ever "adopt" it as any part of its final disposition**. The only person ever to advance the statement was its author, the hometown prosecutor, the same person who also used the criminal process of threatening Lowery with sixty years to coerce him into signing it; and the same Mr. Greenbacker who has even threatened Lowery's civil attorney in these proceedings. **[A-93]**.

It is also important to note that **the Statement of Facts was collateral to and not a part of** the proceedings with respect to the acceptance of a guilty plea. Moreover, Defendants Stovall and Redd were never a party to that proceeding; furthermore, the critical issue of excessive force by the police was never litigated in the state proceedings. This Honorable Court knows that the guidelines for acceptance of the guilty plea is that a defendant is arraigned on the formal charge, enters his plea, is voir dired by the Court as to whether he understands the nature of his plea, followed by a summary of the evidence in the criminal case.

The above is simply not the proper basis for invoking the harsh remedy of judicial estoppel.

C. Judicial estoppel requires affirmative intentional action [Lowery never misled the Court]:

In each case cited by the Fourth Circuit Panel, **the application of judicial estoppel** was based upon affirmative action, generally by a civil litigant, **in related proceedings where the interest of all parties are the same**. In addition,

"the party sought to be estopped must have intentionally misled the Court to gain unfair advantage." Lowery at *4; see also John S. Clark Company v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995).

However, in this case, Lowery never initiated any of the criminal proceedings. Further, the parties to that action were dramatically different from the instant civil case, that is Commonwealth v. Lowery as opposed to Lowery v. Stovall et al. A criminal defendant simply does not have the ability to make any court accept a collateral Statement of Facts attacking pending civil litigation. Moreover, how did Lowery ever mislead the trial court when he simply pled guilty to every major felony read to him? Pleading guilty to offenses which could lead to sixty years in jail can hardly be seen as "misleading" or trying to gain an "unfair advantage," especially as no charges were dropped or reduced.

It is unclear how the courts below could assume or conclude that Jerry Lowery, whose left side of the brain was literally destroyed by Stovall's bullet, could possibly recover to the extent that he would be able to play fast and loose with the courts, especially in the absence of any evidentiary hearings on this critical issue. Indeed, the **uncontradicted** evidence of record is that Lowery suffers permanent brain damage from this unjustified police shooting.

Judicial estoppel, where adopted, deals with "cold manipulation and not unthinking or confused blunder. . . ." Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980). Nonetheless, the opinions below seem to suggest, contrary to all the medical evidence, that Lowery not only has miraculously recovered but moreover does not have any brain damage and is indeed mentally alert and astute.

Indeed, one must even question in the first instance Lowery's level of mental competence before he was shot in the brain. If

one accepts the police officers' version that Lowery, armed with only a two-inch plastic key holder, voluntarily walked back to a police car, sat in the police car for the sole purpose of learning why his driver's license had been suspended and, without reason or cause, launched an all out attack against two armed police officers with his little plastic key holder, one would obviously question Lowery's mental competence.

Do we now sanction the shooting of people in the brain who "brandish" tiny key holders and, moreover, deny them the right to have a jury of their peers rule upon the reasonableness of such excessive force? To embrace judicial estoppel under these circumstances, especially in the absence of an evidentiary hearing, empowers a single trial judge to deny a litigant the most fundamental rights of due process and trial by jury.

D. The State trial judge did not meticulously review Lowery's "position."

Lowery was arraigned on a state grand jury indictment of "unlawful" bodily injury in violation of Va. Code Ann. § 18.2-51.1. However, at the hearing and, once again, at the urging of the prosecutor, the Court changed the charge from one of "unlawful" to one of "malicious." This changed the charge from a Class 6 felony to a Class 3 felony. Yet this substantial change was not explained to Lowery by the Court, the prosecutor or even by his own attorney. **[A-45 and A-98]**

Lowery's inability to understand the charges and the bizarre statement of fact is clearly evident from the record of his appearance before the State court on September 15, 1994. **[A-38 to A-54]** The clerk changed the finding of the November 1993 grand jury of an indictment of a minor class six felony to a major class three felony while Lowery stood idly by. It is clear that Jerry Lowery was not only unaware but was unable to comprehend the significance of the change, one of several

critical points as to whether he had the overall capacity to act in such a manner as to invoke judicial estoppel.

The Panel incorrectly assumed that the trial judge carried out his mandate, that is, "the trial judge had a duty to determine that Lowery entered his guilty plea voluntarily with an understanding of the nature of the charge and the consequences of his plea." Va. Sup. Ct. R. 3A:8(b). The state trial court, however, did not advise Mr. Lowery that, by adding the word "malicious," the indictment was changed from a class six felony to a class three felony; the Court did not require Lowery's court-appointed attorney to explain the significance of that change; and the Court did not require that Jerry Lowery and his attorney, Mr. Crowder, agree on the record to waive re-indictment by a grand jury for the new charge. Mr. Lowery simply did not understand the significance of what was taking place and the trial court did not, unfortunately, meticulously review this with him.

Question: Alright; do you understand those charges?
Answer: They read them to me and I can understand some of them. I just have to read it again.

[A-46]

The trial court never inquired of Mr. Lowery as to what part of the charges he did not understand. Instead, the state judge was complacent at the best, embracing each and every prosecutorial position.

E. Diminished mental capacity:

The District Court and the Panel failed to consider the medical documentation that Lowery no longer possessed the mental capacity to mislead a court and is completely unable to comprehend the document prepared by Prosecutor Greenbacker. Lowery's reading comprehension was on a grade-school level, yet another uncontradicted fact.

The trial judge was informed by Lowery's court-appointed attorney in the morning session that there had never been a finding that Mr. Lowery does not suffer from a significant impairment. "The finding by the Central State is that he is competent to stand trial and that's a very low threshold." **[A-41]**

A good example of Lowery's confusion is shown by the following colloquy with the state trial court:

Question: **Alright number seven, I have delayed pleading guilty because of the pendency of the civil suit I filed for my injuries in this episode. At all times, I was guilty of these charges and I knew I was. Is that correct?**

Answer: **Yes.**

Question: **Is that a correct statement?**

Answer: **Could you repeat that?**

Question: **Alright. I have delayed pleading guilty because of the pendency of the civil suit I filed for my injuries in this episode and, at all times, I was guilty of these charges and I knew I was. Is that a correct statement?**

Answer: **I really couldn't understand that one. No, that's not why I did it.**

Question: **Huh?**

Answer: **That's not why I did it. Because of the civil matter. That's not why. Is that right?**

Question: **No, what it says is that you have put off pleading guilty in this case today because you had this civil suit that you had filed against the South Boston Police.**

Answer: **No. I just did that anyway. Not because of the civil suit, but it's just anyway.**

Question: **The civil suit is the suit that you filed against the police asking for some money for your injuries.**

Answer: **Okay, I know now.**

Question: **So, is that a correct statement?**

Answer: **Okay, yes.**

[A-51]

The Court never repeated the full statement and thus, this colloquy is nothing more than the classical comedy sketch "Who's on First," with two persons speaking on different levels. Did Lowery answer "yes" to the question that the civil suit asked for money, or "yes" to the actual statement of his delay in pleading and of his guilt?

Finally, Mr. Crowder (the court-appointed attorney for Lowery) represented to the state court, "I have advised him that his entering pleas of guilty on these criminal charges will very likely affect the civil case that he has against South Boston. And I have also advised that he consult his civil lawyer who is Rod Sager in Richmond on that." **[A-53]**

How could a brain-damaged and incarcerated Lowery, 100 miles from his Richmond Civil Attorney, possibly discuss the

implication of a Statement of Facts that was never prepared until the day of the arraignment?

When civil counsel (Rod Sager) learned of the criminal proceedings, he obtained affidavits of Jerry Lowery's wife and of his half-sister, Elaine Massey. **[A-77 to A-84]** Counsel thereafter asked the local court to set aside and reconsider. These efforts were unsuccessful.

F. Conflicts with Fourth Circuit and U.S. Supreme Court law

The Panel, in passing, observed that "'**In fact, some circuits and jurisdictions have never recognized this doctrine.**'" Lowery at *4 (citing Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987))(emphasis added). Also noted is that "specific requirements" are 'rather vague' and vary from state to state and from circuit to circuit." Id. Specifics, unfortunately, were never fully discussed or developed.

Next, in an apparent reliance on the bogus "Statement of Facts," a document collateral to the criminal pleas of Lowery, the Panel attempted to draw a narrow distinction between "judicial estoppel" and "collateral estoppel." In fact, the Panel's opinion seems to contradict both Fourth Circuit law and Virginia law as to cases with remarkably similar facts. Moreover, it is also in conflict with a separate affirming opinion to one of these decisions by this Honorable Supreme Court. Unfortunately, this Panel did not discuss, much less distinguish, the decision in Haring v. Prosise, 462 U.S. 306 (1983). See also Kane v. Hargis, 987 F.2d 1005 (4th Cir. 1993) (where counsel for the police advanced the same argument presented herein)(citing Selected Risks Ins. Co. v. Dean, 355 S.E.2d 579 (Va. 1987)). See also, John S. Clark Company v. Faggert & Frieden, P.C., 65 F.3d 26 (4th Cir.

1995)("...factual disputes between the parties should be resolved by a jury").

In Prosise, the Court discussed in detail under what circumstances a state judgment in Virginia entered on a guilty plea might be considered issue preclusive in a Federal § 1983 action. This Court in Prosise specifically rejected issue preclusion. It is respectfully submitted that there is little distinction, if any, between issue preclusion and judicial estoppel. Moreover, **the Supreme Court**, in its affirmance of Prosise, **held that the doctrine of preclusion would not be invoked in Virginia** for the following reasons:

> **First, the legality of the search. . . was not actually litigated in the criminal proceedings. Indeed, no issue was "actually litigated" in the state proceeding since Prosise declined to contest his guilt in any way. Second, the criminal proceedings did not actually decide against Prosise any issue on which he must prevail in order to establish his § 1983 claim. The only question raised by. . . Prosise's guilty plea. . . was whether Prosise unlawfully engaged in the manufacture of a controlled substance. This question is simply irrelevant. . . to Prosise's right to compensation from state officials under § 1983.**

Prosise, 462 U.S. at 316.

As the Supreme Court set forth, "**none** of the issues in the § 1983 action could have been determined in the criminal proceeding. Specifically, a determination that the county police officers engaged in no illegal police conduct would **not** have been essential to the trial court's acceptance of Prosise's guilty plea." Prosise, 462 U.S. at 316 (emphasis added). Such is precisely the situation in Lowery.

The Supreme Court also noted that considerations might well suggest the advisability of a guilty plea in certain situations and that an individual's "decision **not** to exercise his right to stand trial **cannot** be regarded as a concession of any kind. . . [such that a § 1983 challenge would fail]." Prosise, 462 U.S. at 319 (emphasis added). See also, Brown v. Felsen, 442 U.S. 127, 137 (1979).

The Supreme Court next rejected the view, as otherwise argued by defendants below, that by pleading guilty a defendant would automatically waive any claim involving an antecedent § 1983 violation. 462 U.S. at 316. The Supreme Court concluded that **to adopt** the Defendants' **rule of preclusion would threaten** "important interests in preserving federal courts as an available forum for the vindication of constitutional rights." Id. at 322 (citing numerous cases).

The Court noted that

> **such a rule would be wholly contrary to one of the central concerns which motivated the enactment of § 1983, namely, the 'grave congressional concern that the state courts had been deficient in protecting federal rights.'**

Id. at 323 (citing numerous cases).

Here as well, there is simply nothing contained in Lowery's guilty plea nor in his plea agreement that resolves the issue of excessive force. Assuming, arguendo, that Lowery's conduct was wrong, it still does not warrant the use of excessive deadly force by the police which is the unresolved issue mandating jury action. Thus, it does not preclude a federal jury from considering the central issue of excessive force.

G. Conflicts with Virginia law

The Panel did not address the fact that Virginia does not apply preclusion, except in the case of arsonists. Id., citing

several Virginia cases. The application of judicial estoppel below gives the undesirable affect of creating uncertainty between federal and state courts and of promoting forum shopping. See Allen v. Zurich Ins., 676 F.2d at 1168 n.1 (J. Bryan dissenting). The outcome is clearly inconsistent with what is required under Virginia law and is contrary to the position concerning conflicts between federal and state courts as outlined in Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 540 (1958). Further, it allows a single Judge, pre-trial, to sweep aside Constitutional safeguards; ignore uncontested physical and medical facts; sidestep contested facts that would otherwise on Summary Judgment inure to Petitioner's benefit; and, allow the criminal process to be abused by an overzealous prosecutor who sought to protect the police officers with whom he daily worked by improperly using the criminal process to undercut the federal § 1983 civil litigation, which civil litigation involved significant constitutional rights.

H. Conflicts with other federal circuits and state courts

It appears that the opinion below, in fact, reflects a minority view when compared to other Federal Circuits. As an example, the Tenth Circuit has rejected the doctrine of judicial estoppel. In so doing, the Tenth Circuit said as follows:

> **We reasoned that even in the case of false statements in pleadings, public policy can be vindicated otherwise -- and more practicably and fairly in most instances -- then through suppression of truth in the future. We also declared that adoption of judicial estoppel 'would be out of harmony with the great weight of authority independent of that rule, and would discourage the determination of cases on the basis of the true facts as they might be established ultimately.'**

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U. S. v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1986). See also Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956); accord, Konstantinidis v. Chen, 626 F.2d 933, 938 (D.C. Cir. 1980) (Inconsistent positions or statements should be resolved by a jury).

The Tenth Circuit went on to note that the limited number of courts that have adopted judicial estoppel do so with the limitation of preventing a party from presenting an inconsistent assertion in subsequent litigation only if that party succeeded in the earlier litigation." U. S. v. 49.01 Acres of Land, at 390 (citing Edwards v. Aetna Life Ins. Co., 690 F.2d. 595, 599 (6th Cir. 1982)).

Surely, no one would suggest that Lowery in any way succeeded in the "earlier litigation." Indeed, he pled guilty to every major felony named by the prosecutor.

Lowery was not successful in the criminal case. Being found guilty, "the judgment", is not success. Success in a criminal case is taking an inconsistent position that results in being found not guilty. There is no basis for judicial estoppel where the position taken by the party in a previous action was not under oath and the party was not successful in the case. Gibraltar Savings Assoc. v. Gerst, 417 S.W.2d 584 (Tex. 1967). Further, the inducements and promises initiated by the prosecutor (Greenbacker) to entice these guilty pleas were not in any way binding on the trial judge.

Those courts which have applied estoppel require an affirmative showing of prejudice by the party who seeks its application.

> **Where the defendant has failed to allege or demonstrate to any extent that it was prejudiced in the prior action, in which the defendant was not even a party, [the]**

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> **defendant, being a stranger to the prior action, may not avail itself of the defense of judicial estoppel based upon plaintiff's alleged inconsistent legal position in that action, and accordingly defendant's motion for summary judgement is denied. Chemical Bank v. Aetna Ins Co., 417 N.Y.S.2d 382 (1979); see also Patriot Cinemas, Inc. v. General Cinema, 834, F.2d 208, 212 1st Cir. 1987). Scarano v. Central R. Co., 203 F.2d 510, 513 (3rd Cir. 1953) (There must be the "same adversary" in both proceedings).**

Nothing in the state court was in any way prejudicial to Defendants Stovall and Redd in that case. **They were not parties** to the criminal proceeding; have not alleged nor demonstrated any prejudice to them by the plea; and therefore cannot claim the defense of judicial estoppel.

I. Plaintiff does contest the reasonableness of force used:

The Panel also wrongfully suggests that plaintiff did not contest the reasonableness of the force used by Stovall, even assuming that plaintiff attacked them with his tiny key holder. To the contrary, plaintiff has and does contest that the officers acted in a reasonable manner when Stovall shot plaintiff in the head when allegedly challenged by a key holder.

It should be remembered that this is a case involving excessive use of force. The **only expert testimony** submitted on this issue assumed that the police officers' version of the incident was true, yet **finds that the police officers "grossly" used excessive force** and were objectively unreasonable. **[A-55 to A-61]** Thus, even assuming that Lowery's plea bargain statement is binding, at the very least a factual question is raised by this undisputed expert testimony on the issue of excessiveness of the force used under the circumstances.

J. The federal trial judge erred in refusing to give Lowery an evidentiary hearing and to protect his federal rights.

Without ever seeing or meeting Jerry Lowery, the district judge (Jackson L. Kiser) arbitrarily ruled on the basis of the state proceedings, that Lowery was playing "fast and loose with two (2) courts" and, "I'm not going to let Mr. Lowery blow hot and cold at the same time." He then refused to voir dire Lowery as requested by counsel. **[A-95 to A-97]**

The district judge had a duty to protect §1983 federal rights that Congress felt might not be adequately protected in state courts. Prosise, supra at 323. Likewise, the court had a duty to submit the "Statement of Facts" to a civil jury for its consideration as an evidentiary item. John S. Clark, supra; Faggert, supra; Parkinson, supra; Konstantinidis, supra; and, 49.01 Acres of Land, supra. See also Fed. R. Evid. 607 and 613.

CONCLUSION

Significant legal issues were overlooked by the federal courts below. Those opinions, in part, assume that Lowery initiated the plea-bargain Statement, which he did not; that the trial court relied on the Statement, which it did not; that there was mutuality of parties, which there was not; that Lowery was successful before the criminal court, which he was not; and that the Statement was dispositive of the Federal issue of excessive force, which it was not.

The opinion also conflicts with other Federal Courts; Virginia and other state courts; and the mandate of this Supreme Court; and, such conflicts are not reconciled in the opinion. Accordingly, Cert. should issue to allow review of the significant constitutional questions presented herein as well as to reconcile and consider the far reaching and chilling effects of the application of judicial estoppel by a trial judge and its resulting impact with respect to basic due process considerations.

SIGNATURE PAGE

I certify that the foregoing Petition for Writ of Certiorari was forwarded to the Clerk of the United States Supreme Court at Washington, D.C. for filing this 4th day of December, 1996.

Respectfully submitted,

Jerry Lowery
Plaintiff-Petitioner

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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

JERRY LOWERY,

Petitioner,

v.

T.E. REDD, Individually and in his official capacity as a police officer; and LARRY STOVALL, Individually and in his official capacity as a police officer.

Respondents.

APPENDIX

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH U. S. CIRCUIT COURT OF APPEALS

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Jerry Lowery,
Plaintiff—Appellant,

v.

Larry Stovall;
T.E. Redd,
Defendants—Appellees,
and
City of South Boston, Virginia;
J.V. Simmons, Individually
and in his official capacity as a police officer,
Defendants.

No. 95—1729.

United States Court of Appeals,
Fourth Circuit.
Argued Feb. 2, 1996.
Decided Aug. 6, 1996.

Before HALL and HAMILTON, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by published opinion. Judge HAMILTON wrote the opinion, in which Judge HALL and Senior Judge PHILLIPS joined.

OPINION

HAMILTON, Circuit Judge:

Jerry Lowery appeals the district court's grant of summary judgment in favor of Thomas Redd and Larry Stovall on his claims that Redd and Stovall subjected him to an unreasonable seizure in violation of his Fourth Amendment rights. See 42 U.S.C. Secs. 1983 & 1985. For the reasons discussed below, we affirm.

I

This action arises out of an early morning traffic stop on February 1, 1991. Redd, a police officer for the City of South Boston, Virginia (South Boston), was on routine patrol when he noticed a car driving with its headlights off through the lot of a construction company. Redd followed the car and called in the car's license plate number to the dispatcher's office. Redd subsequently learned that the registered owner's license had been suspended. At approximately 1:45 or 1:50 in the morning, Redd spotted the car again and proceeded to stop the car, believing that the driver was driving with a suspended license. Stovall, another officer with South Boston, arrived shortly after Redd stopped the car to provide back—up. During the stop, the driver, who was Lowery, accompanied Redd to the patrol car and sat in the front passenger seat while Redd called the dispatcher's office to find out why his license had been suspended. At this point, the parties' versions of the events in question diverge.

According to Lowery, he got out of the patrol car to show Redd what he had in his pants pockets. Then Stovall, who had been in the back seat of Redd's patrol car, got out of the patrol car and, for no reason, shot Lowery in the head. Lowery then claims that, as he attempted to get back in the patrol car to lay his head on the seat, he scratched Redd on the face with his fingernails.

The officers, however, present a dramatically different version of the incident. According to Redd and Stovall, while Redd was in the process of writing Lowery a ticket for driving with a suspended license, Lowery began going through his left pants pocket. At this point, Redd asked Lowery what he had in his pocket and then reached over to pat down Lowery's pocket. Lowery then reached into his pants pocket, pulled out an object, pushed Redd against the driver's side door, and used the object to cut Redd on the face. Because Redd felt a burning sensation, he "yelled out knife." (J.A. 1420). Stovall, who had been sitting in the back of the patrol car and saw that Redd was bleeding, attempted to stop Lowery by grabbing him and punching him in the back of his neck. Stovall's attempts to restrain Lowery failed, but Stovall's actions caught Lowery's attention because Lowery then started to climb over the patrol car's front seat in an attempt to attack Stovall. Lowery swung at Stovall in an attempt to cut him with the object, but Stovall fended off this attack by catching Lowery's arm. Stovall then drew his firearm and shot Lowery. Although Stovall tried to shoot Lowery in the shoulder, he shot Lowery in the head when Lowery ducked as Stovall fired. The object that Lowery used to cut Redd, rather than a knife, turned out to be a black

magnetic key holder that was approximately three inches long and one inch wide.

After the shooting, Virginia charged Lowery with maliciously causing bodily injury to Redd with the intent to maim, disfigure, disable or kill him in violation of Va. Code Sec. 18.2—51.1.[1] Prosecution on this charge was delayed because Lowery was initially deemed incompetent to stand trial due to his injuries.

Lowery subsequently commenced this Sec. 1983 action against Redd and Stovall[2] alleging that they had violated his constitutional rights. Specifically, Lowery's complaint alleged that Stovall's use of force violated his Fourth Amendment right to be free from unreasonable seizures, which is applied to the states through the Fourteenth Amendment. Lowery's complaint

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[1] Section 18.2—51.1 in pertinent part states:

> Malicious bodily injury to law—enforcement officers; penalty; lesser included offense.——If any person maliciously causes bodily injury to another by any means including the means set out in Sec. 18.2—52, with intent to maim, disfigure, disable or kill, and knowing or having reason to know that such other person is a law—enforcement officer ... engaged in the performance of his public duties as a law—enforcement officer, such person shall be guilty of a Class 3 felony....

[2] Lowery also named South Boston and its police chief as defendants in his lawsuit, alleging that the violation of his constitutional rights was caused by an official policy or custom of these two defendants.

also alleged that Redd owed him a duty to protect him from Stovall's use of excessive force and that Redd breached this duty. The defendants subsequently moved for summary judgment. The district court, finding no evidence that either South Boston or its police chief was deliberately indifferent to Lowery's constitutional rights, granted summary judgment in favor of them. The district court, however, denied Redd's and Stovall's motion for summary judgment because (1) Redd had not yet been deposed and (2) Rainey v. Conerly, 973 F.2d 321 (4th Cir.1992), precluded the application of qualified immunity because the parties presented irreconcilable accounts of why Lowery was shot.

Lowery, Redd, and Stovall appealed the district court's initial order granting summary judgment, and based upon the reasoning of the district court, we affirmed in toto the district court's decision. Lowery v. Redd, 14 F.3d 595, 1993 WL 527998 (4th Cir. Dec.21, 1993) (unpublished), cert. denied, ——— U.S. ———, 114 S.Ct. 2676, 129 L.Ed.2d 811 (1994).

While this case was pending on remand, Lowery, who had been found competent to stand trial, pleaded guilty to violating Va. Code Sec. 18.2—51.1. In addition to pleading guilty, Lowery signed a statement admitting that (1) he maliciously attacked Officer Redd, (2) he intended to kill him, if necessary, to escape, and (3) he knew of the consequences that his guilty plea would have on his civil suit:

3. I was selling cocaine in South [B]oston before my arrest and the cocaine I had with me when the officers arrested me was possessed by me for later sale.

4. On February 1, 1991 when I was arrested, I cut Officer Thomas E. Redd on the face with a metal key holder because I wanted to escape custody. I knew he would find my cocaine. I intended to maim and disable him and at the time Officer Stovall shot me I was intending to kill Redd if I had to [in order] to get away.

* * *

6. I have discussed this thoroughly with my attorney Mr. Crowder, including the implications of this plea for my civil case. Having considered all of this I believe it is in my best interest to proceed.

7. I have delayed pleading guilty because of the pendency of the civil suit I filed for my injuries in this episode. At all times I was guilty of these charges, and I knew I was.

(J.A. 686).

Finally, in taking Lowery's guilty plea, the state trial judge meticulously reviewed Lowery's statement to make certain that each of the statements was indeed true and that Lowery understood the statements. After taking Lowery's guilty plea and hearing a summary of the state's evidence from a prosecution witness, the trial judge accepted Lowery's guilty plea, finding Lowery was "in fact guilty of each charge." (J.A. 769).

Based on Lowery's guilty plea and statement, Stovall refiled his motion for summary judgment and Redd supplemented his previous motion for summary judgment, arguing that Lowery's guilty plea rendered the parties' factual dispute moot. Although summary judgment based on qualified immunity is inappropriate "where what actually happened ... need[s] to be resolved by the trier of fact in order to reach a decision on the applicability of qualified immunity," Rainey, 973 F.2d at 324, the district court found that it did not need to resolve the conflicting versions of the shooting because Lowery was precluded by the doctrine of judicial estoppel from disputing that he maliciously attacked Redd before Stovall shot him.

Because the district court precluded Lowery from disputing that he maliciously attacked Redd before being shot by Stovall, it held that Stovall was entitled to qualified immunity because "Stovall's behavior would appear objectively reasonable from the perspective of the officer at the time of the shooting." (J.A. 1006). The district court also held, regardless of the propriety of its ruling concerning judicial estoppel, that

Redd was entitled to qualified immunity on Lowery's claim that Redd breached his alleged duty to protect him because there was no clearly established standard to govern Redd's actions. Lowery then noted this appeal.

II

Lowery claims that Stovall's shooting him for allegedly no reason constituted the use of excessive force, and thus, violated his Fourth Amendment right to be free from unreasonable seizures. In judging the reasonableness of a seizure, we consider three factors: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade by flight." Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). In addition, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id.

Stovall claims that he is entitled to qualified immunity on Lowery's excessive force claim. A defendant, such as Stovall, is entitled to qualified immunity if his conduct did not contravene "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The clearly established standard for the use of excessive force at the time of this incident was whether a reasonable officer in Stovall's place could have had probable cause to believe that Lowery posed a threat of serious harm to

himself or Redd. See Tennessee v. Garner, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985); McLenagan v. Karnes, 27 F.3d 1002, 1006—07 (4th Cir.) (citing Garner), cert. denied, ——— U.S. ———, 115 S.Ct. 581, 130 L.Ed.2d 496 (1994). We have stated that an officer in Stovall's position is entitled to qualified immunity if "a reasonable officer possessing the same particularized information as [Stovall] could have, in light of Garner, believed that his conduct was lawful...." McLenagan, 27 F.3d at 1007.

We have no doubt that Lowery's present allegations, if true, constitute a violation of his clearly established rights. But Stovall contends that Lowery's present allegations are irrelevant. Specifically, Stovall argues that Lowery is precluded from making these allegations by the doctrine of judicial estoppel because his present allegations are inconsistent with his prior guilty plea. Thus, Stovall reasons that he is entitled to qualified immunity because Lowery's admission that he maliciously attacked Redd shows that a reasonable officer in Stovall's place could have believed that shooting Lowery was lawful.

Lowery, however, contends that his present allegations cannot be precluded by the doctrine of judicial estoppel. We disagree.

A.

We first discuss the principles underlying the doctrine of judicial estoppel. When a party attempts to assert a position that is inconsistent with a prior position that the party has

successfully asserted in another court, courts have a number of steps that they may take to prevent such an attempted abuse of the judicial process. For example, courts may apply collateral estoppel (also known as issue preclusion) or equitable estoppel to prevent the attempted abuse. In addition to those doctrines, courts may apply the closely related doctrine of judicial estoppel.[3] "Judicial estoppel precludes a party from adopting

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[3]Judicial estoppel is "[c]losely related to collateral estoppel, but [it is] dissimilar in critical respects." Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir.1982). For example, judicial estoppel does not require that the issue be actually litigated in the prior proceeding or that the parties meet the requirement of mutuality, even if the mutuality requirement is recognized by state law, as it is here. See Selected Risks Ins. Co. v. Dean, 233 Va. 260, 355 S.E.2d 579, 581 (1987). One reason for these differences is that judicial estoppel is a matter of federal law, not state law, see Allen, 667 F.2d at 1167 n. 2, especially when the court's jurisdiction is based on the presence of a federal question rather than the diversity of the parties.

Judicial estoppel is also closely related to equitable estoppel. See Rand G. Boyers, Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Nw. U.L.Rev. 1244, 1248 (1986). Unlike equitable estoppel, a party asserting judicial estoppel does not have to prove detrimental reliance because judicial estoppel is designed to protect the integrity of the courts rather than any interests of the litigants. See Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1220 (6th Cir.1990); Tenneco Chems. v. William T. Burnett & Co., Inc., 691 F.2d 658, 665 (4th Cir.1982).

Therefore, judicial estoppel may apply in a particular case "where neither collateral estoppel nor equitable estoppel ... would apply." Allen, 667 F.2d at 1166—67.

a position that is inconsistent with a stance taken in prior litigation. The purpose of the doctrine is to prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process." John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 28—29 (4th Cir.1995) (citations and internal quotation marks omitted). See also Mark J. Plumer, Note, Judicial Estoppel: The Refurbishing of a Judicial Shield, 55 Geo. Wash. L.Rev. 409, 435 (1987) ("Judicial estoppel is properly defined as a bar against the alteration of a factual assertion that is inconsistent with a position sworn to and benefitted from in an earlier proceeding.").

Courts have had difficulty in formulating a specific test for determining when judicial estoppel should be applied. See Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 212 (1st Cir.1987) ("The specific requirements, however, are 'rather vague' and vary from state to state and from circuit to circuit. In fact, some circuits and jurisdictions have never recognized the doctrine.") (citations omitted); Allen, 667 F.2d at 1166 ("The circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle...."). But, nonetheless, there are certain elements that have to be met before courts will apply judicial estoppel.

First, the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation. Id. And the position sought to be estopped

must be one of fact rather than law or legal theory. Tenneco, 691 F.2d at 664—65; Plumer, supra, at 411.

Second, the prior inconsistent position must have been accepted by the court. Teledyne, 911 F.2d at 1218; see Allen, 667 F.2d at 1167 (finding that "the record conclusively shows" that the party had successfully asserted a prior inconsistent position). The insistence upon a court having accepted the party's prior inconsistent position ensures that judicial estoppel is applied in the narrowest of circumstances. Indeed, "the prior success rule narrows the scope of judicial estoppel to the point at which the necessity of protecting judicial integrity outweighs the ramifications of that protection upon the litigant and the judicial system." Boyers, supra note 3, at 1256. Because of the harsh results attendant with precluding a party from asserting a position that would normally be available to the party, judicial estoppel must be applied with caution. See Faggert & Frieden, 65 F.3d at 29.

Finally, the party sought to be estopped must have "intentionally misled the court to gain unfair advantage." Tenneco, 691 F.2d at 665. Indeed, we have stated that this factor is the "determinative factor" in the application of judicial estoppel to a particular case. Id.; Faggert & Frieden, 65 F.3d at 29. Thus, courts will not apply judicial estoppel "when a party's prior position was based on inadvertence or mistake." Faggert & Frieden, 65 F.3d at 29. With these principles in mind, we turn to consider whether the district court erred in applying the doctrine of judicial estoppel to preclude Lowery

from contradicting the statements he made when he pleaded guilty to violating Va. Code Sec. 18.2—51.1.

B.

Our review of the record shows that the district court properly applied the doctrine of judicial estoppel to preclude Lowery from disputing that he maliciously attacked Redd before Stovall shot him.

First, Lowery's present position regarding the circumstances of the shooting is contradictory to the position he took when he pled guilty. During his guilty plea hearing, Lowery admitted to maliciously attacking Redd. Specifically, the trial judge, in taking Lowery's guilty plea, asked if Lowery had cut Redd on the face with the metal key holder to escape, and Lowery said that he had. Lowery's present position, however, is that he did not attack Redd with the magnetic key holder prior to the shooting and that Stovall shot him without reason.

Lowery argues that these positions are reconcilable. Specifically, Lowery contends that his statement does not show when he cut Redd. Thus, Lowery reasons that his statement is consistent with his present position because the statement allegedly does not foreclose the possibility that he cut Redd on the face by scratching Redd as he was trying to crawl into the patrol car after being shot by Stovall.

Lowery's argument, however, is undercut by the plain language in his statement accompanying his guilty plea:

On February 1, 1991 when I was arrested, I cut Officer Thomas E. Redd on the face with a metal key holder because I wanted to escape custody. I knew he would find my cocaine. I intended to maim and disable him and at the time Officer Stovall shot me I was intending to kill Redd if I had to [in order] to get away.

(J.A. 686) (emphasis added). The "wanted to escape custody" language cannot be reconciled with Lowery's claim that he scratched Redd as he was trying to get back into the patrol car because the positions are diametrically opposed to each other. Because Lowery's present position necessarily conflicts with his prior position, the first requirement for applying judicial estoppel has been met.

Next, we consider whether the trial judge accepted Lowery's prior inconsistent position. "[J]udicial acceptance means only that the first court has adopted the position urged by the party ... as part of a final disposition." Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 n. 5 (6th Cir.1982). Although judicial estoppel does not apply to the settlement of an ordinary civil suit because "there is no 'judicial acceptance' of anyone's position,"[4] the taking of a guilty plea in a criminal proceeding is not similar to the settlement of a civil suit.

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[4]Reynolds v. Commissioner, 861 F.2d 469, 473 (6th Cir.1988) (finding a bankruptcy court's approval of a settlement between a debtor and one of his creditors constitutes a "judicial acceptance" because the court has a duty to make sure the settlement is fair and equitable).

In taking the guilty plea, the trial judge had a duty to determine that Lowery entered his guilty plea "voluntarily with an understanding of the nature of the charge and the consequences of the plea." Va. S.Ct. Rule 3A:8(b). The record of the plea proceeding shows beyond dispute that the trial judge carried out this mandate. Moreover, the record here shows that the trial judge had a factual basis for finding Lowery guilty. The trial judge asked Lowery whether each of the assertions in the statement accompanying his guilty plea was true, rather than whether he merely understood the statements. Further, the court heard a summary of the state's evidence from a prosecution witness. Significantly, in sentencing Lowery, the trial judge stated that Lowery was "in fact guilty of each charge." (J.A. 769). Thus, we find that the trial judge accepted Lowery's position when he accepted his guilty plea.

Finally, we turn to the issue of whether Lowery's attempt to assert his present position is an intentional attempt to mislead the court to gain unfair advantage in this action. By pleading guilty, Lowery received a drastically reduced sentence. Because of his criminal record, Lowery was facing forty to sixty years imprisonment before entering into a plea agreement with the State. In exchange for his pleading guilty and signing the accompanying statement, the State agreed to recommend that Lowery be sentenced to only ten years, suspended after the service of two years in prison. After Lowery carried out his part of the bargain, the State kept its word and recommended that he receive a ten—year sentence with eight years suspended; a sentence that the trial judge imposed upon him. But, after receiving the benefit of the plea bargain, Lowery now wants to

have it the other way, arguing that we should find that he did not maliciously attack Redd.

For the reasons aptly expressed by Professor Hazard, we find this argument "too much to take":

> Particularly galling is the situation where a criminal convicted on his own guilty plea seeks as a plaintiff in a subsequent civil action to claim redress based on a repudiation of the confession. The effrontery or, as some might say it, chutzpah, is too much to take. There certainly should be an estoppel in such a case.

Geoffrey Hazard, Revisiting the Second Restatement of Judgments; Issue Preclusion and Related Problems, 66 CORNELL L. REV. 564, 578 (1981). As it is clear that Lowery is "blowing hot and cold as the occasion demands"[5] or wanting to "have [his] cake and eat it too,"[6] we conclude that Lowery's arguments are nothing more than an intentional attempt to mislead the district court and this court to gain unfair advantage in this action. Thus, the district court did not err in finding that the doctrine of judicial estoppel precluded Lowery from arguing that he did not maliciously attack Redd. See Lichon v. American Universal Ins. Co., 435 Mich. 408, 459 N.W.2d 288, 293 (1990) (finding that if a plea of nolo

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[5]Allen, 667 F.2d at 1167 n. 3.

[6]Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1177 (D.S.C.1974).

contendere constituted an admission of guilt then the defendant would be judicially estopped from asserting he was innocent of the charge to which he plead nolo contendere); People v. Goestenkors, 278 Ill.App.3d 144, 214 Ill.Dec. 1008, 1011, 662 N.E.2d 574, 577 (1996) (finding that after pleading guilty a party is estopped from asserting his preplea position because "[t]he law will not tolerate a party in a legal proceeding swearing under oath to the untruth of some matter and then swearing under oath to the truth of that same matter").

C.

Next, we consider whether the district court properly concluded, in light of Lowery's guilty plea, that Stovall was entitled to qualified immunity.

Lowery has strenuously opposed the district court's use of his guilty plea to preclude him from disputing whether he maliciously attacked Redd before Stovall shot him. But, significantly, he has not taken issue with the district court's conclusion that Stovall, upon seeing Lowery attack Redd and hearing Redd yell that Lowery had a knife, would have had probable cause to believe that Lowery posed a threat of serious harm to Redd. See Tennessee v. Garner, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985) (finding a police officer has the right to use deadly force only if the officer had probable cause to believe that the suspect poses a threat of serious harm to the officer or others). We believe Lowery's decision not to take issue with the district court's conclusion was wise because the district court properly found Stovall acted as a reasonable officer would have in his situation, and therefore, Stovall is

entitled to qualified immunity. See McLenagan, 27 F.3d at 1007—08 ("We will not second—guess the split—second judgment of a trained police officer merely because that judgment turns out to be mistaken, particularly where inaction could have resulted in death or serious injury to the officer and others."); Slattery v. Rizzo, 939 F.2d 213, 216—17 (4th Cir.1991) (finding police officer who shot the plaintiff while conducting a sting operation was entitled to qualified immunity because the police officer believed the plaintiff was coming at him with a weapon that turned out to be a beer bottle).

Therefore, the district court's grant of summary judgment to Stovall is affirmed.

D.

Finally, we conclude that the district court's grant of summary judgment in favor of Redd was proper. Lowery alleged that Redd owed him a duty to protect him from Stovall's use of excessive force and that Redd breached this duty. Having concluded that Stovall's use of force was reasonable under the circumstances, Lowery's claim against Redd necessarily fails.

Therefore, the district court's grant of summary judgment to Redd is affirmed.[7]

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[7]In any event, the district court properly found that Redd would be entitled to qualified immunity on this claim because there was no clearly established standard to govern Redd's actions. See McLenagan, 27 F.3d at 1008 n. 9.

III

Accordingly, for all the foregoing reasons, the grant of summary judgment in favor of Stovall and Redd is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1729
CA-92-4-D

FILED
September 5, 1996

JERRY LOWERY

Plaintiff - Appellant

v.

LARRY STOVALL; T. E. REDD

Defendants - Appellees

and

CITY OF SOUTH BOSTON, VIRGINIA; J. V. SIMMONS,
Individually and in his official capacity as a police officer

Defendants

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellant's motion to enlarge petition by five pages, and his petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the motion to enlarge the petition by five pages is granted; the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
ACTING CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

JERRY LOWERY,	)
	)
Plaintiff,	)
	)Civil Action No. 92-0004-D
v.	)
	)MEMORANDUM OPINION
LARRY J. STOVALL,	)
et al.,	)
	)By: Jackson L. Kiser,
	)Chief Judge
Defendants.	)United States District Court
	)

Plaintiff Jerry Lowery filed this action alleging various allegations, including 42 U.S.C. §§ 1983 and 1985 civil rights violations (excessive force claims), Virginia state law negligence, and Virginia state law assault and battery. Defendants City of South Boston and Chief J.V. Simmons were dismissed pursuant to an order, entered October 15, 1995, granting their summary judgment motion.[8] At that time, I denied summary judgment as to codefendants Officer Larry J.

[8]The Fourth Circuit affirmed my decision on December 21, 1993, 1993 U.S. App. LEXIS 33309, and the Supreme Court denied certiorari on June 13, 1994.

Stovall and Officer Thomas E. Redd. As to Officer Redd, I noted that I would reconsider his summary judgment motion after his deposition could be taken (to allow opportunity for adequate discovery). His deposition was taken on August 12, 1994. The parties are now before the Court on Redd's motion for summary judgment filed August 16, 1994. On September 29, 1994, Redd filed a supplemental brief in support of his motion citing a plea agreement Lowery reached in state court on underlying charges. Officer Stovall has also renewed his motion for summary judgment based on these new developments. These motions have been fully briefed and argued and are now ripe for determination. For the reasons discussed below, I will grant both defendants' motions.

I. Facts

In the early hours of February 1, 1991, Officers Stovall and Redd of the South Boston Police Department pulled over Lowery pursuant to a "routine" traffic stop. During the stop, Lowery was shot in the head by Officer Stovall.

A. Lowery's version

Lowery, whose memory allegedly has been impaired, claims that Officer Redd stopped him, learned that he was driving on a suspended driver's license and had him sit in Redd's patrol car while Redd wrote a summons. Redd then asked Lowery to show him the contents of his pockets, and, to comply, Lowery got out of the car. While Lowery was standing outside the car, holding the contents of his pockets in his hands, Redd was still in the car waiting for a response to his radio inquiry as to the reason Lowery's license was suspended. Lowery asserts that Officer Stovall got out of the back seat of

the patrol car, "charged" Lowery and shot him in the side of the head. Lowery maintains that he was unarmed and did not strike or attempt to strike either of the officers before the shooting. After being shot, Lowery went down on one knee. He then began crawling to the patrol car when he was tackled by both officers, preventing him from getting inside the car. During this struggle, he scratched Officer Redd on the face with his fingernail. Lowery denies being in possession of a key holder that defendants allege was used to cut Officer Redd and which contained a quantity of cocaine. Lowery also denies having a passenger in his car.

B. Officers Redd and Stovall's version

Officers Redd and Stovall state that Redd stopped Lowery when Lowery was driving into the Willow Oaks Apartments. Redd approached the driver's side of Lowery's vehicle and asked to see his driver's license. He then informed Lowery that he was driving on a suspended license. Lowery became agitated and began cussing. Shortly thereafter, Redd asked Lowery to return with him to his patrol car so that he could issue Lowery a summons. While Redd and Lowery were walking away from Lowery's car, an unknown female exited Lowery's car and ran away carrying something in her hand. Lowery demanded to know why his license was suspended, and Redd radioed in to inquire. Lowery was seated in the front passenger's seat while Redd was in the driver's seat. Lowery appeared nervous and got in and out of the patrol car at least two times. Officer Redd then asked Officer Stovall to join him in the patrol car. Officer Stovall then sat in the back seat of the car.

Lowery was fumbling with his pockets and Redd asked what he was doing. Without warning, Lowery became violent in the front seat, and attacked Officer Redd, slashing him across the face and neck with a sharp object. Officer Redd shouted "knife" and Officer Stovall attempted to restrain Lowery by grabbing his shoulders. Unsuccessful, Officer Stovall then tried to restrain him by grabbing the back of his shirt and punching him with as much force as possible at the base of the neck. Undeterred, Lowery turned and started to climb over the seat and attempted to attack Stovall with the object. Stovall deflected Lowery's attack with one hand and with the other shot Lowery in the head as he (Lowery) ducked. After the shooting, no knife was found, but a black plastic magnetic key holder approximately three inches long and one inch wide was recovered.

II. Lowery's plea agreement

Lowery was indicted on the underlying felonies, possession of cocaine with intent to distribute and malicious wounding of a police officer, stemming from the February 1, 1991, incident (when he was shot by Officer Stovall). At that time, Lowery was not prosecuted on those criminal charges because he was found incompetent to stand trial. Lowery was later arrested in Richmond on separate charges of cocaine possession and found competent to stand trial there. He was also found competent to stand trial on the underlying charges in this case and those charges were reinstated. On September 15, 1994, Lowery pled guilty to those charges and signed under oath a STATEMENTS OF FACT, attached to Redd's Supplemental Brief, concerning the events of February 1, 1991. At all relevant times he was represented by counsel (Charles

Crowder). Moreover, he was questioned in open court by Judge McCormick (Exhibit 2 to Redd's Supplemental Brief). During that questioning, Lowery's lawyer informed the court that he had advised Lowery to speak to his attorney in the civil suit about this matter and Lowery still wished to plead guilty (Exhibit 2, p.21).

III. Redd's Summary Judgment Motion

The doctrine of qualified immunity protects the "objectively reasonable" acts of police officers, Harlow v. Fitzgerald, 457 U.S. 800 (1982), considered from the perspective of the officer at the time. Gooden v. Howard County, Maryland, 954 F.2d 960, 965 (4th Cir. 1992). Officer Redd is entitled to summary judgment on qualified immunity grounds under the most recent Fourth Circuit pronouncement of that standard. McLenagan v. Karnes, 27 F.3d 1002 (4th Cir.), cert. denied, 63 U.S.L.W. 3413 (1994). There, the plaintiff was arrested for driving while under the influence and taken before a city magistrate in a nearby building. Another person who also had been arrested picked up a handgun from a desk. An officer then ran from the room yelling that a man had a gun. The plaintiff also fled the room and was shot by another officer who heard the officer yelling about the gun and saw the plaintiff fleeing. Plaintiff then filed a § 1983 excessive force claim. The trial court denied summary judgment as to the officer who yelled and the officer who pulled the trigger, but the Fourth Circuit determined that all of the defendants were entitled to summary judgment based on qualified immunity. The court also noted that even had it held that summary judgment was not appropriate for the shooting officer, "it would be inequitable to deny [the officer who shouted and fled] the

protection of qualified immunity on the basis of an eventuality that she could not reasonably have foreseen." Id. at 1008. In both McLenagan and Slattery v. Rizzo, 939 F.2d 213 (4th Cir. 1991), the Fourth Circuit permitted summary judgment for defendants based on qualified immunity where the officer shot the plaintiff based on a [reasonably] mistaken assumption about what the plaintiff was doing.

In my October 15, 1992, order, I refused to dismiss Officer Redd and Stovall because Lowery's wounding was subject to two contrary versions which must be resolved by a finder of fact. As to Redd, however, there is no dispute of material fact regarding his use of excessive force. His only actions consisted of asking Lowery to sit in his patrol car and asking to see the contents of his pockets, under Lowery's version, and under his own, yelling knife. Lowery does not establish that Redd owed him a duty to protect him from Stovall. In McLenagan, 27 F.3d at 1008 n.9, the Fourth Circuit hints at a duty to protect in the exceptional case, relying on DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 197 (1989), but notes that even if that case fit the exception the plaintiff could not establish the existence of a clear standard to govern defendant's actions. Lowery has done no better here. He relies on Pike v. Eubank, 90 S.E.2d 821 (Va. 1956), where the Virginia Supreme Court recognized the duty of a police officer to protect an individual in his custody. In Pike, a state law assault and battery suit, the defendant held the plaintiff while he received further blows and "countenanced and aided" the assault of the plaintiff. Id. at 826. In addition, the case never mentioned a duty to protect. Likewise, Johnson v. United States Government, 258 F. Supp. 372, 376-77 (E.D. Va. 1966),

which established that a warden is required to exercise ordinary care to keep prisoners safe, was a negligence claim based on a statutory duty that applies only to prisoners, and was dismissed. Redd's conduct is objectively reasonable under McLenagan and I will grant him summary judgment based on qualified immunity.

IV. The effect of Lowery's guilty plea

To reach a decision regarding Stovall's renewed motion for summary judgment, I must first determine the effect of Lowery's guilty plea. Lowery pled guilty in open court to both counts against him, the second of which charged that he: "Unlawfully and feloniously and maliciously did cause bodily injury to Police Officer T.E. Redd with the intent to maim, disfigure, disable or kill him, and knowing or having reason to know that such person was a law enforcement officer." (Exhibit 1 to Redd's Supplemental Brief (Statements of Fact; indictment); Exhibit 2 to Redd's Supplemental Brief, pp. 5-6 (Transcript of guilty plea proceedings)). Lowery argues that I should not consider his plea and accompanying Statements of Facts[9] as evidence, or I should consider it an inconsistent

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[9]Lowery's sworn Statements of Fact provides in part:

> 4. On February 1, 1991 when I was arrested, I cut Officer Thomas E. Redd on the face with a metal key holder because I wanted to escape custody. I knew he would find my cocaine. I intended to maim and disable him and at the time Officer Stovall shot me I was intending to kill Redd if I had to to get away.

statement that goes to his credibility. Lowery, in essence, urges that he should not be precluded from arguing a position in his civil trial that is entirely inconsistent with that underlying his guilty plea and his sworn Statements of Fact giving in connection with the guilty plea.

I am required to give the state court judgment the same preclusive effect Virginia courts would give it under 28 U.S.C. § 1738 and Allen v. McCurry, 449 U.S. 90 (1980). Thus, if Virginia would give Lowery's conviction preclusive effect, I must also. While Virginia generally has a rule against collateral estoppel or issue preclusion by criminal judgments, based on a lack of mutuality, see Aetna Casualty & Surety Co. v.

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5. Since my release from the hospital, I have faked not being able to understand the proceedings against me to help my defense and the civil suit filed on my behalf against the South Boston police.

6. I have discussed this thoroughly with my attorney Mr. Crowder, including the implications of this plea for my civil case. Having considered all of this I believe it is in my best interest to proceed.

7. I have delayed pleading guilty because of the pendency of the civil suit I filed for my injuries in this episode. At all times I was guilty of these charges, and I knew I was.

His statement was then notarized and witnessed by the Commonwealth's attorney and his attorney.

Anderson, 105 S.E.2d 869, 872 (Va. 1958), it has made exceptions to prevent wrongdoers from profiting from their crimes, at least in the case of arsonists. Eagle, Star & British Dominions Ins. Co. v. Heller, 140 S.E. 314 (Va. 1927), and has hinted that it would apply the preclusion rules more liberally, see Luke Construction Co. v. Simpkins, 291 S.E.2d 204 (Va. 1982). The court retreated from this more liberal position in Selected Risks Insurance Co. v. Dean, 355 S.E.2d 579 (Va. 1987), where it refused to give a conviction preclusive effect in a subsequent civil suit over the convicted insured's right to coverage. The court distinguished Heller and failed even to acknowledge Luke Construction Co. Three justices dissented from the opinion based on Heller, id. at 582-83 (Poff, j., dissenting, joined by Russell and Thomas, jj.), and one justice would have given the criminal conviction preclusive effect as to the essential elements of the offense. Id. at 583 (Thomas, j., dissenting). While in Aetna the criminal conviction was based on a plea of guilty, the court did not distinguish it from a conviction after trial. Later cases dealt with convictions after trial and likewise did not treat the distinction between a conviction based on a guilty plea and one after resulting from a trial. I cannot conclude how the Virginia Supreme Court would treat a judgment based on a guilty plea for the purposes of collateral estoppel based on the above cases.

My analysis does not end here, however, because Lowery's guilty plea is considered a judicial admission of the underlying elements of the formal criminal charge. McCarthy v. United States, 394 U.S. 459, 466 (1969). Virginia law permits me to consider the guilty plea as evidence in a later civil suit. Va. Code § 8.01-418. The real question is whether

Lowery's plea conclusively establishes the essential elements of the crime. In Prosise v. Haring, the Fourth Circuit looked to the Restatement (Second) of Judgments for guidance on how to treat a guilty plea. 667 F.2d 1133, 1140 (4th Cir. 1981), aff'd on other grounds, 462 U.S. 306 (1983)[10]; see Restatement (Second) Judgments § 85 cmt. b (1982). The Restatement states that a guilty plea estops a party from contesting facts representing the elements of the offense in a subsequent civil suit. To the drafters, this was a matter not of issue preclusion but of evidence. The Fourth Circuit noted that other courts have routinely found estoppel arising from guilty pleas, at least as to the essential elements of the crime charged, though not necessarily litigated, because those issues have been necessarily "judicially admitted." Prosise, 667 F.2d at 1140 & nn. 7-9; see, e.g., In re Raiford, 695 F.2d 521, 523 (11th Cir. 1983). The court then assumed, without deciding, that the guilty plea would have preclusive effect as to essential elements of the crime in subsequent § 1983 actions.

The analysis in the Fourth Circuit's opinion in Prosise seems akin to the doctrine of judicial estoppel, which precludes a party from taking inconsistent legally significant factual positions in the same or subsequent litigation. See Guinness

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[10]On appeal, the Supreme Court held that Virginia courts would not give a guilty plea preclusive effect in a § 1983 suit for an allegedly illegal search and seizure, and the Court refused to apply any other preclusionary rule or waiver. The Court emphasized that the guilty plea only determined that Prosise unlawfully engaged in the manufacture of a controlled substance which was completely irrelevant to his search and seizure claim. 462 U.S. at 316.

PLC v. Ward, 955 F.2d 875, 899 (4th Cir. 1992). As pointed out in Allen v. Zurich Insurance Co., 667 F.2d 1162, 1166-67 (4th Cir. 1982), this doctrine is not intended to prohibit the permissible practice of advancing inconsistent claims, legal theories, or defenses in the same litigation, but instead to prevent intentional self contradiction to gain unfair advantage. This doctrine is separate from the state law doctrines of issue or claim preclusion. It is a question of federal law because it deals with the integrity of the federal tribunal and the effect in a federal proceeding of a prior legal or factual position. Id. at 1167 n.4.

Based on the Fourth Circuit's analysis in Prosise, and the doctrine of judicial estoppel, I will give Lowery's guilty plea and accompanying sworn statements preclusive effect here as to the essential elements underlying his plea. Lowery has denied before me that he attacked or attempted to attack the officers, and has asserted that he only inadvertently scratched Officer Redd after he was shot. In state court, while represented by counsel, Lowery judicially admitted that he attacked Redd and intended to do him serious harm. Moreover, in conjunction with his plea of guilty, Lowery signed a Statements of Fact that even further contradicts his factual position before me. Also, at the time the plea was entered, he was questioned extensively by Judge McCormick in open court to ensure that he understood the implications of his plea and that he entered the plea voluntarily. Despite the affidavits Lowery has filed and the other collateral attacks he has launched in this Court to undermine his plea, he has not withdrawn his plea in the state court. He has instead only asked that it be suspended. Lowery is bound by his judicial admission of the facts underlying the

elements of the offense to which he pled guilty and by those facts given under oath in the prior judicial proceeding.

Consequently, both Stovall and Redd are entitled to qualified immunity under McLenagan. Because Lowery has judicially admitted that he attacked Redd and intended to use deadly force, Stovall's behavior would appear objectively reasonable from the perspective of the officer at the time of the shooting. Slattery, 939 F.2d at 216. I, therefore, will grant summary judgment as to both officers.

An appropriate order shall issue.

/s/ Jackson L. Kiser

Chief United States' District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

JERRY LOWERY,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 92-0004-D
v.	)	
	)	ORDER
LARRY J. STOVALL,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

For the reasons set forth in the accompanying memorandum opinion, it is hereby **ADJUDGED** and **ORDERED** that defendant Redd's Motion for Summary Judgment is GRANTED.

It is **FURTHER ORDERED** that defendant Stovall's Motion for Summary Judgment is GRANTED.

It is **FURTHER ORDERED** that this case be DISMISSED as to all parties and all claims.

The clerk is directed to send a certified copy of this order and accompanying memorandum opinion to all counsel of record, to strike all pending motions not otherwise ruled on as moot, and to strike this case from the docket.

ENTERED this 8th day of February, 1995.

/s/ Jackson L. Kiser

Chief United States' District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

JERRY LOWERY,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 92-0004-D
v.	)	
	)	ORDER
LARRY J. STOVALL,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

The Court has considered plaintiff's motion for reconsideration of the Court's ruling on defendants' motion for summary judgment and plaintiff's brief in support thereof. The Court has also reviewed "confidential" affidavits submitted by plaintiff in support of the motion, and the Court has considered defendants' response to plaintiff's motion.

Plaintiff's motion is hereby **DENIED**.

Although the Court reviewed the affidavits submitted by the plaintiff, they will be **STRICKEN**. The information contained in the affidavits was available to the plaintiff long before the Court ruled on the motion for summary judgment; thus, the affidavits come too late. Moreover, the affidavits, in

large part, fail to comply with the requirements of Fed.R.Civ.P. 56(e).

The Clerk is directed to send a copy of this Order to all counsel of record.

ENTER this 9th day of March, 1995.

/s/ Jackson L. Kiser

Chief United States' District Judge

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF HALIFAX

COMMONWEALTH OF VIRGINIA,
Plaintiff.

v.

JERRY COLE LOWERY,
Defendant.

PROCEEDINGS:

THE HON. CHARLES L. MCCORMICK, III, JUDGE.

September 15, 1994

(In the morning)

APPEARANCES:

COUNSEL FOR PLAINTIFF:	JOHN E. GREENBACKER, JR., ESQ. Courthouse Square Halifax, Virginia 24558
COUNSEL FOR DEFENDANT:	CHARLES CROWDER, ESQ. P. O. Box 369 South Hill, Virginia 23970

THE COURT: All right.

MR. GREENBACKER: We're ready, Your Honor.

MR. GREENBACKER: Your Honor, may I approach the bench with counsel?

(Whereupon, counsel approaches the bench after which the following was had:)

THE CLERK: All right, are you prepared for your arraignment, sir?

DEFENDANT LOWERY: Yes.

THE CLERK: State of Virginia, County of Halifax, to-wit: In the Circuit Court of said county, the Tenth Judicial Circuit. The Jurors of the Commonwealth of Virginia, in and for the body of the County of Halifax and now attending the Circuit Court at its November Term, 1993, upon their oaths present that Jerry Cole Lowery, heretofore, to-wit, on the first day of February, 1991, in the City of South Boston and within the jurisdiction of the said Circuit Court of the County of Halifax, Count I: Unlawfully and feloniously did possess with the intent to distribute a Schedule II controlled substance, namely cocaine, in violation of Section 18.2-248 of the Code of Virginia, as amended.

How do you plead?

DEFENDANT LOWERY: Not guilty.

MR. CROWDER: Not guilty.

THE CLERK: Count II: Unlawfully and feloniously did cause bodily injury to Police officer T. E. Redd with the intent to maim, disfigure, disable or kill him, and knowing or having reason to know that such person was a law enforcement officer, in violation of Section 18.2-51.1 of the Code of

Virginia, as amended, against the peace and dignity of the Commonwealth of Virginia. How do you plead?

MR. CROWDER: Not guilty.

THE COURT: Now, Mr. Lowery, you understand that in a plea of not guilty you're entitled to a jury trial if you want one.

MR. CROWDER: Judge, I don't think he can hear.

THE COURT: Bring him around.

(Defendant Lowery approaches the bench:)

THE COURT: Mr. Lowery, I'm asking you if you're waiving your right to a jury trial and electing to submit your case to the Court sitting without a jury.

MR. CROWDER: The Court is asking you whether or not you want to be tried by a Judge or by a jury.

DEFENDANT LOWERY: By a jury? I don't know; by a jury, I think.

THE COURT: What's he saying?

MR. CROWDER: Judge, he said by a jury he thinks.

THE COURT: Well, now, you're here today. You've come here and you've indicated to the Court, your lawyer has previously, that you want a trial by the Judge without a jury. Now, which do you want? Do you want a Judge trial or a jury trial?

MR. CROWDER: Judge, can I carry him to the side for a minute?

MR. GREENBACKER: Your Honor, I'd like the record to reflect that according to the analysis we have, he does not suffer from any impairment.

THE COURT: I understood that there had been a------

MR. CROWDER: Judge, that would be a incorrect reflection in the record, because there has never been a finding that he does not suffer from a significant impairment. The finding by Central State is that he is competent to stand trial and that's a very low threshold. It doesn't mean he's not impaired.

THE COURT: All right; they have determined that he is in fact competent to stand trial and assist in his own defense.

MR. CROWDER: That's what I understand.

THE COURT: All right.

MR. CROWDER: Can I maybe talk to him on the side?

THE COURT: All right.

(Brief recess after which the following was had:)

MR. CROWDER: I think we had just started the questioning, Judge, about whether Mr. Lowery wanted to be tried by a Judge or by a jury.

THE COURT: All right, Mr. Lowery, what do you say to that question?

DEFENDANT LOWERY: I say, do we have to have a jury? (Inaudible)

THE COURT: I'm not hearing him.

MR. CROWDER: I think he's asking if he has to have a jury, Judge.

THE COURT: No, he doesn't have to have a jury. I'm asking you, I'm telling you that you have a right to a jury but you do not have to have one, no. You can give up that right and have your case tried by me as the Judge sitting without a jury. Is that what you want to do?

DEFENDANT LOWERY: I guess. I don't know anything about it, so I'll just take that, I guess.

MR. CROWDER: I think he said yes, sir. And the last thing he said was I'll just take that, I guess.

THE COURT: Do you want to go ahead with the trial of the case today without a jury; is that correct?

DEFENDANT LOWERY: Yes, sir.

THE COURT: All right, now, you are ready for trial?

DEFENDANT LOWERY: I don't know if I'm ready or not.

THE COURT: Are you ready for trial, Mr. Crowder?

MR. CROWDER: Yes, sir. Judge, I think what he's asking for is a continuance so that he could maybe think the decision over some more.

THE COURT: Well, he's had plenty of time to do that. This case has been set for a long time.

DEFENDANT LOWERY: But nobody told me, nobody talked to me about exactly the way we're doing now. Nobody talked to me. They just hadn't talked where I was locked up; just haven't talked to me. They just hadn't talked to me and I'd just like to, you know, a little time to make sure. And I just don't know what to do right now. But a couple of days, a couple of weeks probably I would know after talking with my family and stuff. I just don't know right now.

THE COURT: Mr. Crowder, let me see you and Mr. Green backer in chambers.

(Whereupon, counsel and the Court adjourned to chambers. Later in the afternoon a guilty plea was entered, which transcript has been prepared:)

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF HALIFAX

COMMONWEALTH OF VIRGINIA,
Plaintiff.

v.

JERRY COLE LOWERY,
Defendant.

PROCEEDINGS:

THE HON. CHARLES L. MCCORMICK, III, JUDGE.

September 15, 1994

APPEARANCES:

COUNSEL FOR PLAINTIFF:	JOHN E. GREENBACKER, JR., ESQ. Courthouse Square Halifax, Virginia 24558
COUNSEL FOR DEFENDANT:	CHARLES CROWDER, ESQ. P. O. Box 369 South Hill, Virginia 23970

THE COURT: All right, are we ready for arraignment?

MR. CROWDER: Yes, sir.

THE COURT: All right.

THE CLERK: Will the defendant please stand? State of Virginia, County of Halifax, to-wit: In the Circuit Court of the said County. The jurors of the Commonwealth of Virginia, in and for the body of the County of Halifax and now attending the Circuit Court at its November Term, 1993, upon their oath present that Jerry Cole Lowery heretofore to-wit, on or about the first day of February in the year 1991 in the City of South Boston and within the jurisdiction of the said Circuit Court of the County of Halifax.

Count 1: Unlawfully and feloniously did possess with the intent to distribute a Schedule II controlled substance, namely cocaine, in violation of Section 18.2-248 of the Code of Virginia, as amended, against the peace and dignity of the Commonwealth. How do you plead?

DEFENDANT LOWERY: Guilty.

THE CLERK: Count II: Unwillfully and feloniously did cause bodily injury to Police Officer T. E. Redd with the intent to maim, disfigure, disable or kill him, and knowing or having reason to know that such person was a law enforcement officer, in violation of Section 18.2-51.1 of the Code of Virginia, as amended, against the peace and dignity of the Commonwealth.

How do you plead?

DEFENDANT LOWERY: Guilty.

THE COURT: All right, Mr. Crowder, bring him around and let me question him about his guilty pleas.

Are we ready?

MR. GREENBACKER: I think so, Your Honor. I notice that in the statement that was pushing, this is referred to unlawful wounding of him. I think we need to make it clear that this is ----- Well, under that section there is no other, there is no requirements, I don't think. Let me check on that to be absolutely sure.

THE COURT: Well, he's charged with unlawfully and feloniously.

MR. GREENBACKER: What is the cite on that; 51.1. No, this is malicious. It's supposed to say malicious. I don't know if we should delineate that and then notarize it too.

MR. CROWDER: I think the indictment says unlawful.

THE COURT: Yes.

MR. GREENBACKER: Maybe we'd better change that.

THE COURT: That just says unlawful wounding.

MR. GREENBACKER: We'd better have him re-arraigned on that and make that correction.

Your Honor, he's going to have to put his initials on this.

THE COURT: All right.

MR. GREENBACKER: Your Honor, maybe we'd better re-arraign him on that.

THE COURT: Just stand where you are.

All right; go ahead and re-arraign him on Count II.

THE CLERK: State of Virginia, County of Halifax, to-wit: In the Circuit Court of the County of Halifax and now attending the Circuit Court at its November Term, 1993 upon their oath present that Jerry Cole Lowery heretofore, towit: Own or about the first day of February in the year of 1991 in the City of South Boston and within the jurisdiction of the said

Circuit Court of the County of Halifax. Count Number II: Unlawfully and feloniously and maliciously did cause bodily injury to Police Officer T. E. Redd with the intent to maim, disfigure, disable or kill him, and knowing or having reason to know that such person was a law enforcement officer, in violation of Section 18.2-51.1 of the Code of Virginia, as amended, against the peace and dignity of the Commonwealth.

How do you plead?

DEFENDANT LOWERY: Guilty.

THE COURT: All right, Mr. Lowery, now come around and stand right here and answer the questions that I'm going to ask you. And answer them loud enough so this lady can take it down you see.

BY THE COURT:

Q All right, now; state your full name?

A James Cole Lowery.

Q And how old are you?

A Thirty-nine.

Q Thirty-nine? And are you the person charged in this indictment with the commission of these offenses?

A Yes, sir; I'm the one. That's my name.

Q You are the person that'ss charged?

A Yes.

Q All right; do you understand those charges?

A They read them to me and I can understand some of them. I just have to read it again.

Q Well, do you understand that you're charged with possession of cocaine with the intent to distribute it?

A Yes, I know that.

Q All right; and do you also understand that you're charged with the malicious wounding of Officer Redd of the South Boston Police Department?

A Okay; yes.

Q You understand that?

A Yes, sir.

Q All right; and are you entering your guilty pleas freely and voluntarily?

A Yes, sir.

Q And are you entering these guilty pleas because you are in fact guilty of these crimes?

A Yes, sir.

Q Speak up, now, so this lady can hear you.

A Yes.

Q All right; do you understand that on a plea of guilty you're not entitled to a jury trial?

A Yes, sir.

Q All right; has anyone connected with the state in any way threatened you or forced you to plead guilty?

A Did anybody?

Q What is that?

A Did anybody?

Q Yeah.

A No, didn't nobody.

Q All right; do you understand that on the cocaine charge you could receive up to forty years in the penitentiary and on the malicious wounding charge you could receive up to twenty years in the penitentiary on that one; do you understand that?

A Yes, sir.

Q All right; that would be a total of sixty years. You've discussed all of these matters with Mr. Crowder, have you?

A Yes, sir.

Q After doing so, did you decide for yourself that you would plead guilty?

A Yes, sir.

Q All right.

A I talked to him.

Q And you decided for yourself that you would plead guilty?

A Yes, sir.

Q Do you understand that by pleading guilty you may waive your right of appeal from the decision of this Court? Do you understand by pleading guilty you may waive any right of appeal from the decision of this Court.

A Okay.

Q Do you understand that?

A Yes, sir.

Q All right; are you satisfied with Mr. Crowder as your lawyer?

A Yes, sir.

Q And do you understand the questions I've asked you? Do you understand the questions?

A Yes, sir.

Q All right, now; you have signed a statement of facts which have been entered into, which you have signed and witnessed by Mr. Crowder and the Commonwealth Attorney and notarized by a notary public. I'm going to go through that

statement of facts and ask you to affirm that each one of them is true. Do you understand what I'm going to do?

A Yes.

Q The first one is; I know my rights and understand them. Is that correct?

A Yes, I know my rights.

Q And you understand them?

A Yes.

Q All right; the second one is: I am now competent to stand trial and to assist my lawyer in the defense of this case. Is that true?

A Yes, sir.

Q Number Three: I was selling cocaine in South Boston before my arrest and the cocaine I had with me when the officers arrested me was possessed by me for later sale. Is that correct?

A Yes, sir.

Q All right; February 1, 1991 when I was arrested I cut officer Thomas E. Redd on the face with a metal key holder because I wanted to escape custody. I knew he would find my cocaine. I intended to maim and disable him, and at the time Officer Stovall shot me I was intending to kill Redd if I had to to go get away. Is that correct?

A Yes, sir.

Q That's correct?

A Yes.

Q All right; Number five: Since my release from the hospital I have faked not being able to understand the proceedings against me to help my defense and the civil suit

filed on my behalf against the South Boston Police. is that correct?

A I don't understand that.

Q All right; this is what you state in Paragraph Five. Since my release from the hospital I have faked not being able to understand the proceedings against me to help my defense in the civil suit filed on my behalf against the South Boston Police. Is that correct?

A Yes, sir.

Q It is?

A Yes, sir.

Q All right; Number Six: I have discussed this thoroughly with my attorney, Mr. Crowder, including the implications of this plea for my civil case. Having considered all of this I believe it is in my best interest to proceed. Is that correct?

A Yes, sir. I don't understand about proceed.

Q Proceed means to go forward with what we're doing today.

A Yes, sir.

Q All right; Number Seven: I have delayed pleading guilty because of the pendency of the civil suit I filed for my injuries in this episode. At all times I was guilty of these charges and I knew I was. Is that correct?

A Yes.

Q Is that a correct statement?

A Could you repeat that?

Q All right; I have delayed pleading guilty because of the pendency of the civil suit I filed for my injuries in this

episode. And at all times I was guilty of these charges and I knew I was. Is that a correct statement?

A I couldn't really understand that one.

Q All right. What it's saying is that you have put off pleading guilty to these charges because you had this civil suit pending against the South Boston Police.

A No, that's not why I did it.

Q Huh?

A That's not why I did it; because of the civil matter, that's not why? Is that right?

Q No, what it says is that you have put off pleading guilty in this case today because you had this civil suit that you had filed against the South Boston Police.

A No, I just did that anyway; not because of the civil suit but it's just anyway.

Q The civil suit is the suit that you filed against the police asking for some money for your injuries.

A Okay; I know now.

Q So, is that a correct statement?

A Okay; yes.

Q All right. I understand that the Commonwealth will recommend that I serve two years of a ten year sentence on the charges of malicious wounding of an officer and possession of cocaine with the intent to distribute which are now pending against me, and that those sentences should run concurrently with each other; that is, at the same time. No other promises have been made to me and no persons have forced me to enter these pleas. Do you understand that-----

A Yes, sir.

Q -----to be your agreement in this case?

A Yes, sir.

Q All right; by entering these pleas I give up my trial rights, especially my right to a jury trial, the right to confront my accusers and hear the evidence against me and my right to appeal this case. Is that a correct statement?

A Okay; yes, sir.

Q I have discussed all of this with my lawyer, Mr. Crowder, and I am fully satisfied with his assistance in this case. Is that a correct statement?

A Okay; yes, sir.

Q All right, then.

A Do I get this?

Q You want a copy of this?

A Yes, sir.

* * *

[Lt. H. B. Rice of the South Boston Police was called by the prosecutor to summarize the criminal case.]

* * *

THE COURT: All right, Mr. Crowder?

MR. CROWDER: Judge, those are the facts which it is my understanding would have been the Commonwealth's evidence had we tried this case. I don't know that I'm comfortable with stipulating all of that at this point. But I think that what we, or what Mr. Lowery has agreed to in that agreement right there is plenty sufficient for the Court to make a finding.

MR. GREENBACKER: Your Honor, if he would say that he wants that in support of his plea, that will be fine. But I would like him asked directly on that.

THE COURT: All right. Mr. Lowery, do you want the Court to accept the statement which you signed in this case in support of your plea of guilty; is that correct, to both of these charges?

DEFENDANT LOWERY: Yes, sir.

THE COURT: All right, and it so accepted and filed.

MR. GREENBACKER: That concludes our stipulation, Your Honor.

THE COURT: All right.

MR. CROWDER: Judge, we have nothing that we are going to present. Judge, I just would say that in defending the criminal part of Mr. Lowery's case, there has also been on the outside of this a civil action which was filed and which he has knowledge of, and I believe it may be reflected in that agreement somewhere. But in the civil case he's filed against the City of South Boston on more than one occasion in writing and in person I have advised him that his entering pleas of guilty on these criminal charges will very likely affect the civil case that he has against South Boston. And I have also advised that he consult his civil lawyer who is Rod Sager in Richmond on that. And he's been advised of that and he still chose to do this.

THE COURT: All right; it will be so noted in the record.

MR. CROWDER: Thank you.

THE COURT: Mr. Greenbacker, what is your recommendation in this now?

MR. GREENBACKER: A ten year sentence on each-charge, all but two suspended and that they run concurrently.

THE COURT: All right. All right, then, Mr. Lowery, if you will stand up. Mr. Lowery, is there anything further you wish to say before the Court passes final judgment?

DEFENDANT LOWERY: No, sir.

THE COURT: All right, then, Mr. Lowery; then on your plea of guilty to these two charges and the Court now having heard a summary of the evidence by the officer, I find that you are in fact guilty of each charge. And in accordance with the recommendation of the Commonwealth's Attorney will sentence you to ten years in the penitentiary of this Commonwealth on each of the two charges to run concurrently; that is, at the same time. I will, however, suspend all but two years on each of those charges on the condition of your good behavior for a period of ten years following your ultimate release from incarceration.

The effect of that is to leave you with an active two-year penitentiary sentence. Do you understand?

DEFENDANT LOWERY: Yes, sir; I think. It's two years; you said it was two years?

THE COURT: What you're ending up with here today is an active two-year penitentiary sentence with the balance of your sentence being suspended on the condition of your good behavior for a period of ten years following your release from incarceration. Do you understand?

DEFENDANT LOWERY: Yes, sir.

THE COURT: All right; and it will be so ordered.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
VIRGINIA

JERRY LOWERY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	92-CV-0004-D
CITY OF SOUTH BOSTON, VA,	)	
	)	
LARRY STOVALL, individually	)	AFFIDAVIT OF
and in his official	)	D. P. VAN
capacity as a police officer,	)	BLARICOM
	)	
T.E. REDD, individually	)	
and in his official capacity	)	
as a police officer,	)	
	)	
and	)	
	)	
J.V. SIMMONS, individually	)	
and in his official capacity	)	
as a police officer	)	
	)	
Defendants.	)	

The undersigned being first duly sworn, on oath states as follows:

1. That my name is D. P. Van Blaricom and I make this affidavit on behalf of plaintiff. I was the Chief of Police for the City of Bellevue, Washington from January 1, 1975 thru December 31, 1985 and my law enforcement career spanned 29 years of continuous police service. A detailed statement of my qualifications, including academic background and employment history are set forth on the attached Exhibit "A", which by reference is made a part hereof. My areas of expertise in the police sciences include but are not necessarily limited to police use of force; less-lethal alternatives to deadly force; criminal investigation; police policy and administration; police standards, practices and procedures; firearms; internal investigation and police discipline. I have testified as a police expert opinion witness in state and federal courts on a variety of police-related issues for both plaintiff and defense.

2. I was retained by plaintiff's attorney Rodney Sager to review the facts and circumstances of plaintiff being shot by Officer Larry J. Stovall on February 1, 1991 in the City of South Boston, Virginia and at the time of making this report I have reviewed the following:

a. Police reports of the incident;

b. The radio log for the period of the incident;

c. The South Boston Police Department's General Order on Firearms;

d. The South Boston Police Department's Rules and Regulations;

e. Videotapes of Officer Stovall's deposition (2);

f. Videotapes of Lieutenant Rice's deposition (3);

g. Videotapes of Dispatcher Comer's deposition (2);

h. Videotapes of Officer White's deposition (2);

i. Videotape of the involved police vehicle; and

j. Various related color photographs (43).

3. In my professional opinion there was no probable cause to believe that plaintiff's driver's license was suspended and the traffic stop of plaintiff was without lawful authority. In reaching that conclusion I considered the following facts:

a. Officer T. E. Redd had previous contact with plaintiff but had failed to identify him; and

b. He subsequently stopped plaintiff on the mere assumption that the driver of the vehicle was also the registered owner thereof.

4. In my professional opinion plaintiff was not armed with any weapon capable of causing death or serous injury and there was no reasonable suspicion to believer that he was armed. In reaching that conclusion I considered the following facts:

a. No weapon was ever found;

b. The alleged "weapon" was only a small black plastic key holder measuring 2 3/4 inches by 1 1/2 inches; and

c. No objectively reasonable police officer could interpret or suspect such an object to be a dangerous weapon.

5. In my professional opinion the shooting of plaintiff by Officer L. J. Stovall was a grossly excessive use of force and objectively unreasonable. In reaching that conclusion I considered the following facts:

a. Plaintiff and neither the means nor the opportunity to place the officers in fear of death or serious bodily injury;

b. Plaintiff was detained for no more than a traffic misdemeanor; and

c. Officer Stovall intentionally used lethal force to shoot plaintiff in the head.

6. in my professional opinion there were far lesser force alternatives available to the police officers for control of plaintiff. In reaching that conclusion I considered the following facts:

a. Plaintiff was not armed;

b. There were 2 officers present;

c. Officer Stovall is of great strength and a professionally trained heavyweight boxer; and

d. Officer Stovall could have struck plaintiff with his readily available blackjack if it had been necessary to do so.

7. In my professional opinion the shooting of plaintiff violated the South Boston Police Department's General Order on Firearms. In reaching that conclusion I considered the following facts:

a. Officers are only authorized to discharge firearms to "prevent an attack with a deadly weapon" or "to defend himself or other persons from death or serious injury" but neither of these factors was present; and

b. Officers are prohibited from discharging firearms to "effect the arrest of a misdeameaner (sic)".

8. In my professional opinion the shooting of plaintiff violated the South Boston Police Department's Rules and Regulations. In reaching that conclusion I considered the following facts:

a. An officer is required to "conduct himself at all times in keeping with Code of Ethics" and that code states "I will never employ any unnecessary force or violence";

b. The "use of any unnecessary force is prohibited";

c. Officers "shall not use more force in any situation than is reasonably necessary under the circumstances"; and

d. "Officers shall use force in accordance with the law".

9. In my professional opinion the South Boston Police Department has demonstrated deliberate indifference to training officers in the use of force. In reaching that conclusion I considered the following facts:

a. There is no ongoing training provided on use of force after basic training;

b. There is no training on use of force decisions by the United State Supreme Court;

c. Lieutenant H. B. Rich is second in command of the South Boston Police Department and yet he know nothing of Tennessee v. Garner, Graham v. Connor, or any other case law regarding shooting of suspects; and

d. In fact, Lieutenant Rice has no understanding of the concept of "objective reasonableness" as it pertains to use of force and has had no further training in use of

force since he completed basic training over 20 years ago.

10. In my professional opinion Officer Stovall was a known disciplinary problem and was negligently assigned as a shift supervisor. In reaching that conclusion I considered the following facts:

a. Lieutenant Rice an cite a litany of complaints that have been made against him by both citizens and the South Boston Police Department; and

b. In one instance he lost his temper and wanted to fight with a suspect until other officers intervened.

11. In my professional opinion the investigation of plaintiff's shooting was far below the standard of care for such an incident and so seriously flawed as to raise legitimate questions of fact as to how it actually occurred. In reaching that conclusion I considered the following facts:

a. The South Boston Police Department's General Order on Firearms requires a "thorough and objective investigation" of a police involved shooting and this was neither by any measure;

b. The standard of care for police involved shootings is that they be meticulously investigated to resolve all inconsistencies that my be discovered from the evidence and/or accounts of the witnesses;

c. This investigation was superfluous at best and leaves numerous inconsistencies in the alleged facts unquestioned;

d. Even though Lieutenant Rice had never investigated a police involved shooting before and had requested State Police assistance in a non-police

shooting just a month previously, he requested no such assistance in this case where the results show that it was clearly needed.

12. As additional information is made available for my review the opinions state herein my be modified or expanded upon.

/S/
D. P. VAN BLARICOM

SUBSCRIBED AND SWORN to before me this 28th day of September, 1992.

NOTARY PUBLIC in and for the State
of Washington residing at Bellevue.
My Commission expires 11/10/95

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF VIRGINIA
Danville Division

JERRY LOWERY,

Plaintiff,

v.

CITY OF SOUTH BOSTON, ET. AL.,

Defendants.

DE BENE ESSE DEPOSITION OF DR. HENRY H. STONNINGTON

October 20, 1992
Richmond, Virginia

HALASZ & HALASZ
Court Reporters
P. O. Box 223
Richmond, VA 23202
(804) 741-5200
Reported By: TANYA L. WOOD, RPR

* * *

Q As well as the x-rays, CAT scans and diagnostic tests?

A Yes.

Q Now, Doctor, on the basis of those -- on the basis of the records, of the reports, your observations and your specialty in brain trauma and physical rehabilitation, are you able to explain to the jury the areas that were damaged as a result of this bullet, number one?

A Yes.

Q And are you able to tell us some of the areas where bullet fragments still remain within Jerry Lowery's body?

A Yes.

Q Now, sir, does the chart behind you, will that be of help to you to explain to the jury where the bullet entered Mr. Lowery's skull and the nature and extent of the injuries that were received after the bullet entered his skull?

A Yes, it would help.

Q Now, sir, based upon that, would you start with the chart, and let's start with the top center picture. And if there was no arrow there, would you place an arrow there for the entrance of the bullet?

A Yes, the description in the Duke medical record is that the bullet entered in front of the ear, above the temporal mandibular joint, which is the jaw joint as it connects to the skull, which is here. And the record says that the bullet entered three centimeters above this point here.

Q And is that what that picture illustrates?

A That is exactly what that picture illustrates.

Q Now, that picture has another designation that says "skull fracture"?

A Yes.

Q Is that illustrative of the skull fracture initially received when the bullet penetrated Jerry Lowery's skull?

A Correct.

Q And if there was nothing on that picture, would you put the word "skull fracture~' as it is now shown?

A Yes, I would.

Q All right. Now, then, let's move to the picture to the left, and does that show a cutaway revealing brain matter?

A That's correct.

Q Now, does that picture also show the area where the bullet entered and penetrated Jerry Lowery's skull and brain?

A Here is the temporal mandibular joint, and three centimeters above it is where it says the bullet entered.

Q All right. And if you were to label it yourself, would that be where you would be place the label?

A Yes.

Q And based upon the reports, is that a fair representation of the entrance of the bullet into Jerry Lowery's skull and brain?

A Yes.

Q Now, sir, surrounding that entrance point is a large red mass, which has been labeled "hematoma."

A Yes.

Q Now, sir, can you tell us, is that documented in Jerry Lowery's records?

A It is.

Q And what does that mean; can you tell the jury what this means?

A It's where vessels were opened up and there is a blood clot where the bleeding occurred. And, in the operational report, they describe this and how they delivered that blood clot out of the area.

MR. O'BRION: How they -- excuse me?

THE DEPONENT: Delivered it.

MR. O'BRION: Removed it?

THE DEPONENT: Removed it, yeah. Deliver it like you deliver a baby. Sort of extracted it.

MR. O'BRION: Okay.

BY MR. SAGER:

Q Is that because -- can you tell us whether or not they had to cut into his skull even more in order to allow this to be delivered out?

A That is correct. This blue lining would be the dura mater that covers this area, and they describe that area as macerated, torn, and they had to open it more to get this blood clot out.

Q So the surgeons had to cut through bone to get to this point?

A Right. They had to cut through bone to get that to point. But then they had to cut through the lining, and, as they removed this blood clot, the brain behind it was so compressed by that blood clot.

Q Now, sir, this chart illustrates that there is another hematoma, smaller --

A In the front there.

Q And what is that referred to in the medical records as?

A As at the tip of the temporal lobe.

Q Now, that's toward the front of the face; is that -

A That's correct, yes.

Q And does that illustrate what your testimony would be as to the nature of that hematoma?

A That's correct.

Q And you would so label it had you placed the label on yourself?

A Yes.

Q Now, sir, there is some indication, I believe, or you read earlier when Mr. O'Brion was voir diring you -- and I guess we better touch on that -- there's some indication that the bullet entered and may have ricocheted off of a bony prominence?

A Yes. Yes.

Q Now, perhaps, if we went to the top center picture, and then we'll come back down to the left, can you sort of pinpoint either in front of, in top of, below or to the rear of the bullet entrance where that bony prominence generally would be located within the skull?

A Inside there.

Q Okay. And is that to the front of the bullet entrance?

A Yes.

* * *

Q Now, Doctor, can you, in using your charts, explain to us now, so that the jury and Court will understand the nature and extent of the injuries -- and let me just back up one moment. Does the exhibit on the right also show where the bullet fragments were located down to the point of where the large bullet fragment ended up, with those green arrows?

A Yeah, that's right.

Q And, sir, to your knowledge, there is only one gunshot wound to Jerry Lowery's head?

A That's correct.

Q And all the injuries, from your knowledge, sir, are as a result of that one gunshot wound?

A Yes.

Q All of which happened February 1, 1991?

A Yes.

Q Now, using these charts, can you help us understand the nature and extent of Jerry Lowery's injuries?

A Okay. The damage -- you know, there is damage to the brain itself where that hematoma was. The pressure that that hematoma caused would cause damage inside that brain and also in the frontal area. From the description of the operating report, there was damage right through the temporal lobe, which is a part of the brain.

In addition to that, he still has all of the signs of damage of various cranial nerves that are described, and these various cranial nerves do various functions. The seventh cranial nerve is the nerve that makes your face -- left side of his face move. And, you know, his ability to close his left eyelid and to move his left side of his face and left side of his mouth.

The eighth nerve is the hearing nerve. So by that being damaged, he's deaf in that ear. In addition to that being a hearing nerve, it has, also, a vestibular component, which means it's the nerve that allows your balance to be accurate or not. And his loss of balance is part of that. And, of course, the damage to the eighth nerve is not only the hearing, but, also, the noises and various other complaints that he has.

The ninth and tenth nerve have very much to do with swallowing and also the vocal cords. In other words, all that side, on the left-hand side, is paralyzed. So he has difficulty in swallowing, and, as the vocal cord is paralyzed, he has difficulty in speaking as distinctly as he can; in other words, it's a condition called dysarthria, because the vocal cords don't meet as well. And the other problem with that is that as the vocal cords are paralyzed on one side, there is a tendency for him to have food go the wrong way, and that is a danger to him.

The eleventh nerve is the nerve to the muscles in the neck that shrugs your shoulder that's called the trapezius, and, also, the muscle in the neck, the sternomastoid.

The twelfth nerve is the nerve that helps the tongue move, and his left side of his tongue is -- doesn't move and is atrophied, and the muscles in his tongue on that side are practically nonexistent.

The other damage, apart from the spasm, in his carotid artery, there is a complete clot they discovered in the vertebral arteries, and both the carotid arteries and the vertebral arteries are the arteries that supply blood to his brain.

So in addition to having damage due to these actual force that was from the bullet and causing the hematomas, there

is also secondary damage due to his brain having loss of blood supply, which, I'm sure, is causing some of his cognitive and behavioral problems.

So apart from the local damage of not hearing and not moving muscles, there are considerable damage to his brain, apart from even the hematoma, is secondary due to the occlusion of blood to his brain.

Q You use the term "cognitive"?

A Yes.

Q Or cognitive deficits; what does that mean to a jury?

A It's your intellectual ability, your ability to remember, your ability to pay attention, the ability to do mathematics; you know, all your intellectual capabilities.

Q Doctor, the various injuries you've discussed so far, can you tell us whether or not these injuries are permanent for Jerry Lowery, that he will have those injuries for the rest of his life?

A I believe that they are permanent. I followed him for quite sometime, and they have remained the same, and he has plateaued. There has been no change, so I do believe that they are permanent in nature.

Q And do you have an opinion on whether Jerry Lowery, with these injuries, would ever be employable during the remainder of his life, whether it's as a truck driver or working in a hamburger stand or cleaning floors?

A I don't think he's employable. Not only because of his injuries I've described, you know, which are the intellectual and the physical aspect, but, as a result of that injury, I think his language has suffered. Again, that's part of

the brain function, and, also, his behavior has suffered considerably, which, again, is as a result of the brain damage.

* * *

Q Is Jerry Lowery capable of taking care of himself without outside assistance?

A I think his intellectual and behavioral deficits are such that he really does need to have a constant caregiver.

Q And will that be true for the rest of his life?

A I believe so.

Q Now, you have mentioned earlier, memory and cognitive thinking, and I'd like to ask you some questions about brain trauma and, specifically, Jerry Lowery's brain trauma. People with injuries -- and if we can relate this to Jerry Lowery, as well, all right, brain trauma -- is it consistent with this injury for Jerry Lowery to be able to remember some events that dealt with the shooting, but that he may not be able to remember events that occurred during a two- or three-hour period before the shooting?

MR. O'BRION: Let me enter an objection that I'm -- and we're going to let the witness answer, but my objection is that the testimony about memory and when and how it can be given and by whom consistent with brain trauma is almost impossible of nature to be answered by this or any other witness.

* * *

BY MR. SAGER:

Q Can you help us, Doctor, with respect to the expertise you have in brain trauma as to how it affects an individual's memory with respect to some events as opposed to other events?

A It's -- the usual thing that people have problems with remembering things before, during and after a brain trauma, and that's called pre- and post-traumatic amnesia. It is also very common as a result of brain injury, which, after all, the brain is a fluid organ, and when you injure it, it is shaken up and loosens certain cells and disconnects certain cells.

In addition to that, it is apparent that he had loss of blood supply to parts of his brain. Therefore, you have islands of knowledge that the patient has and islands of knowledge that he doesn't have. And it is extremely variable from patient to patient after a trauma, a traumatic event, what they can do and what they can't do, what they can remember and what they can't remember.

Q Therefore, Doctor, is it impossible for anybody to say with accuracy as to what a brain trauma person can accurately remember as opposed to what they cannot remember?

A That is true.

Q That it is impossible?

A That it is impossible.

Q Now, is it consistent with Jerry Lowery's injuries -- and let's use the term -- some people have islands of memory and they lose islands of memory; does "islands" mean bits and pieces of memory?

A That's correct.

Q So, in other words, can you tell us whether or not an island of memory, as you use it, may be the events of the shooting as opposed to another island of event that may be what Jerry Lowery did generally hours before the shooting?

MR. O'BRION: ...

....

Q All right. Now, Mr. O'Brion mentioned certain tests that were given; are you familiar with those?

A The neuropsychological tests, yes.

Q Can you just generally give us a couple of examples from that or can you just do it by your own recollection?

A From my own recollection, he has great difficulty with areas of memory, has difficulty with paying attention, he has behavioral difficulties and so on.

Q Does he have pain?

A Yes, he does have pain.

Q And what is that as a result of?

A Pain is the result of the bullet wound.

Q Will he have this pain for the rest of his life?

A Yes.

Q And will he have language problems the rest of his life?

A Yes.

Q And has he had a loss of intelligence as a result of this trauma?

A Yes.

Q And will that be true for the rest of his life?

A Yes.

Q Has his attention and concentration span been affected by this injury?

A Very much so.

* * *

BY MR. SAGER:

Q Doctor, Mr. O'Brion read to you or went over certain parts of the neuropsychological report of April the 11th, 1991. I'd like to touch on just a few of those items that Mr. O'Brion overlooked during his cross-examination.

A I've got it here.

Q I'm referring, as an example, under "Orientation, Attention, Concentration," it'C Page 3.

A Yeah.

Q It says, "He is able to concentrate effectively on simple tasks; as task complexity increases, however, his concentration deteriorates."

A That's correct.

Q Is that correct?

A Yes.

Q Under "Perceptual-Motor Skills," which Mr. 0'Brion did not include in his questions, it says -- and I ask you if this is correct -- "Although he accurately reproduced all the details of the drawing, there was evidence of poor planning, which was likely caused by impulsivity. There was also evidence of motor persever" --

A Perseveration.

Q What does that mean?

A He perseverates in his speech, that he often repeats things, and the same thing with his movements, that he repeats something over and over again without really having to do so.

Q And under "Language Difficulty," another area that Mr. O'Brion did not ask you about, it says, "Despite repetitions of the question and cuing, he seemed unable to

understand the question and form an appropriate reply"; now, what does cuing mean?

A Cuing means when you give somebody a little bit of help. Give him a clue as to what he should say.

Q Okay. And even with that, he was unable to understand the question and form appropriate replies?

A That's correct.

Q And going to Page 4, which was under the memory, I believe you already did bring this out yourself, but it says, last sentence, "Mr. Lowery's score on the recall trial of the Rey" --

A Osterrieth.

Q -- "Osterrieth complex figure was 10 slash 36."

A Yes.

Q "This falls more than 2 standard deviations below the meaning and indicates significant impairment in visual memory."

A That's correct.

Q What does all that mean to the jury?

A What it means is that particular test shows that if he would look at things and if he would see things, he had great difficulty remembering it. So that's the visual part. The seeing, things that you would see to remember. It's distinct from hearing.

Q Excuse me, sir. And under the "Awareness, Judgment, Problem-solving," in the last part, another area that Mr. O'Brion overlooked, "An attempt was made to administer the comprehension subtest of the Wechsler Audit(sic) Intelligence Scale-Revised, but Mr. Lowery had extreme difficulty" --

MR. O'BRION: Adult.

THE DEPONENT: Adult.

BY MR. SAGER:

Q Adult. "Wechsler Adult Intelligence Scale-Revised," -- I'm reading it at an angle.

A Yeah.

Q "But Mr. Lowery had extreme difficulty comprehending the questions and formulating an appropriate response. When asked why people who are born deaf have difficulty learning to talk, he replied, quote, I don't know, comma, because they are not able to talk, period. I don't understand it, period"; can you explain that to the jury?

A This is a more complex question, and he had really -- he was unable to understand what the question was and was unable to reply to it.

Q And, then, finally, under "Impressions and Recommendations," Mr. O'Brion overlooked Number 1, which says, "Mr. Lowery shows several cognitive deficits that are likely the result of his brain injury. His concentration deteriorates rapidly with increasing task complexity. Both verbal and visual memory are moderately to severely impaired. Expressive language tends to be" --

A Perseverative.

Q Okay. "Disorganized, tangential and rambling. He shows word-finding difficulties and impaired comprehension of complex verbal messages. His judgment and problem-solving abilities are poor when task demands are novel and complex. These deficits will be addressed through cognitive retraining"; and in simple terms, what does that mean to the jury?

A It means that he has a lot of difficulty with language. He really doesn't understand what is taught to him and is unable to express things when -- he's unable to express things. So this is a language difficulty which is rather typical of a damage to the temporal lobe.

Q And are all of these consistent with the type of brain trauma that Jerry Lowery -- all of these problem areas that we've talked about and I just went over with you, are these consistent with the type of brain trauma, bullet injury, that Jerry Lowery received in this case?

A Yes.

....

AFFIDAVIT OF SANDRA LOWERY

My name is Sandra Lowery and I offer this Affidavit to help explain my husband's current mental condition and to share my observations of what happened in my presence when Charles Crowder attempted to get Jerry to plead guilty at the Court in Halifax on Thursday, September 15, 1994. My sworn statement is as follows:

1. That I am 35 years of age and have been married to Jerry Lowery for seven years.

2. That I was married to Jerry Lowery when he was shot in his brain by South Boston police officers.

3. That Jerry has never fully recovered from the gunshot to his brain and at this time has a great deal of difficulty in reading and understanding many things.

4. That from the time he began to remember some of the things that happened when he was shot by the South Boston police, Jerry has always said that he was holding his hands in front of him as he was told to do by one of the police officers when the other officer shot him. Jerry has always said that at no time did he ever attempt to assault or hurt any of the police officers until after he was shot at which time he tried to struggle in order to get into the police vehicle to rest his head where he was bleeding.

5. That I came to the Halifax Court to be with Jerry on Thursday, September 15, 1994 in order to try to help him understand what was happening. During the time I was there in the morning, Mr. Crowder, his public defender, kept telling Jerry that if he pled not guilty and asked for a jury that Jerry would get more time to stay in jail. Mr.

Crowder told Jerry that the prosecutor, Mr. Greenbacker, would give Jerry something like 10 to 40 years if Jerry did not plead guilty. That if Jerry did plead guilty, Mr. Greenbacker would agree to give Jerry two years which meant that Jerry would get out of jail very soon.

6. During the time I was at this hearing, Mr. Crowder kept telling Jerry that part of the plea bargain deal was that Jerry had to admit selling drugs and attempting to kill the police officer and attempting to fake his condition. Jerry kept telling Mr. Crowder that he did not ever try to hurt the police officers and that he had no memory of selling drugs. Jerry said that he may have used drugs.

7. During the time I was present, Jerry asked about his lawyer Mr. Sager several times and Mr. Crowder said that he had spoken to Mr. Sager a couple of times.

8. I do know that Jerry wanted to cooperate with Mr. Crowder because Mr. Sager had asked him to cooperate and that we both thought that Mr. Crowder had told Mr. Sager what was happening as to this plea agreement prepared by Mr. Greenbacker. I have since learned that Mr. Sager did not know anything about this plea agreement and did not, at any time, ever want Jerry to do anything that would hurt his suit against the police officers.

9. After several hours during which Jerry kept telling Mr. Crowder that he did not assault the police officers and did not sell drugs, I had to leave in order to pick up my children in Danville as I am very poor and was not able to have anyone else help me.

10. That night, I received a call from Jerry telling me that he had signed a paper that Mr. Crowder had told him

to sign and that he admitted to everything that Mr. Crowder and Mr. Greenbacker wanted him to admit to so that he could get out of jail. He told me that he was tired of jail and that Mr. Crowder and Mr. Greenbacker made it sound like he would spend 40 to 60 or more years in jail if he did not sign this agreement. Jerry told me he was very tired and that he did not fully understand everything about this agreement and did not understand what affect it would have on his other case against the police officers. Jerry also said that since Mr. Crowder had told Jerry that he had talked to Mr. Sager in the past, that Jerry believed that he should sign this paper because he thought Mr. Sager as well as Mr. Crowder wanted him to based on what Mr. Crowder had told him.

11. Jerry also said that Mr. Crowder told him to sign the plea bargain paper and answer the judge's questions the way Mr. Crowder wanted him to answer the questions as that was the only way he would get the two years and get out of jail soon since he had already spent most of that time in jail waiting for this trial.

12. As I said before, I now know that Mr. Sager never authorized this agreement and had no knowledge of this agreement at the time Mr. Crowder and Mr. Greenbacker gave it to Jerry.

13. It appeared that there was no lawyer at the courthouse that was willing to help Jerry and there was no lawyer at the courthouse who wanted to call Mr. Sager to tell him what was happening. Mr. Crowder said he did not need to call Mr. Sager as he, Mr. Crowder, was his lawyer. From my personal experience, Jerry needs some type of guardian who understands the law and the facts to give him

independent advice so that he can be protected. Because of his brain injury, Jerry will do most anything that anyone tells him to do, especially people that he trusts. Jerry would also say anything to get out of jail so that he can come home to his family.

I swear that the above is true and accurate to the best of my knowledge and belief.

/s/ Sandra Lowery

Sandra Lowery

Sworn and subscribed to before me on this 24th day of September, 1994.

Heidi M. Nunnally

Notary Public

My Commission Expires: 4-30-97

AFFIDAVIT OF ELAINE MASSEY

Re: Jerry Cole Lowery

To Whom It May Concern:

I, Elaine Massey, age 49, do hereby give this Affidavit regarding Jerry Cole Lowery as follows:

1. That I am the half-sister of Jerry Cole Lowery and have known him during his entire lifetime of approximately 38 years.

2. That I am 49 years of age, gainfully employed at a prominent health-care facility in the Richmond area and have never been convicted of a felony nor of any crime of lying, cheating or stealing.

3. That since Jerry's brain injury which resulted from a gunshot wound to his left temple by South Boston police officers, he has relied upon me to read legal documents and correspondence and to explain them to him as he has a great deal of difficulty reading and further lacks an understanding of many words.

4. I know Jerry's civil attorney, Rodney Sager, and have met with him on a number of occasions and hereby attest to the fact that Jerry Lowery trusts Mr. Sager and also has relied upon Mr. Sager, in addition to myself, to read and explain legal matters to him.

5. I have spoken in the past to Jerry's court-appointed Halifax attorney, Mr. Charles H. Crowder, III, on

several occasions, although there was no contact with him during the several weeks which preceded Jerry Lowery's guilty plea at Halifax County, even though I had placed several calls to Mr. Crowder in an effort to speak with him.

6. That while Mr. Crowder was aware of my close relationship with Jerry and, in fact, had relied upon me in the past to supply him (Mr. Crowder) certain records, he did not consult with me nor did he ask me to explain to Jerry what might happen at or during Jerry's final appearance at Halifax where someone got Jerry to plead guilty to attempting to kill or assault the police.

7. Either the same evening of that Halifax hearing or the night after, Jerry called me at my home and sounded very upset. He tried to tell me about the things that had happened at Halifax when he pled guilty, although he was very confused. He explained that his wife had been with him during the morning at the Halifax court but had to leave. He said that he kept trying to plead not guilty but was told in the back room that he would get 40 to 60 years if he did not sign a certain paper and if he did not plead guilty. Jerry further told me that he was promised in the back room that if he did what he lawyer told him, that the prosecutor would give him two years. Jerry told me that he wanted to get out of jail and go home to his wife and was frightened and fearful of getting 40 to 60 years. He told me that when he went back into the courtroom, he was handed a piece of paper which he could not read and, in fact, did not have time to try to read. He was told to sign that paper so that he could get the two years instead of the 40 to 60 years. 8. When Jerry called me to discuss the above, he was very upset and uncertain of

exactly what happened other than he got two years. He kept telling me that he was sorry as he really didn't understand many of the things that happened except that he knew that he had to answer yes to the judge's questions, or else he would get the 40 to 60 years.

9. With regard to the events at Halifax, I have been furnished a copy of and have read the affidavits of Jerry Lowery dated October 6, 1994 and Sandra Lowery, his wife dated September 24, 1994. These affidavits appear to be true and accurate with regard to the telephone conversation I had with Jerry that night and the information he gave to me. I therefore adopt these Affidavits with respect to the information conveyed to me by both Jerry and Sandra. Copies are attached.

10. I did not know until the night before that Jerry was due in Halifax, which information I received in a late call from Jerry telling me that he was told he was going to Halifax the next day, although he was uncertain as to why. As I said earlier, I had been unable to get Mr. Crowder, Jerry's court-appointed attorney, to call me back for the three or four week period preceding this last court hearing and, therefore, I was unaware of what was to happen or else I would have definitely been present with Jerry to help explain things to him.

11. Ever since his shooting and ever since he learned how to once again talk following that shooting, Jerry has consistently said that at no time whatsoever did he ever attempt to hurt or attack those police officers that shot him. He again repeated that same position to me the day after his appearance at Halifax.

12. On the two or three occasions that I did speak with Mr. Crowder, he was well aware that Mr. Sager was Jerry's civil attorney and that he was to speak with Mr. Sager to clarify issues and get assistance regarding past medical information. He also knew that Jerry had a civil suit pending regarding this shooting.

13. That while Jerry's brain damage and medical condition has improved somewhat since the shooting, Jerry nevertheless continues to display selective memory and recall, that is he remembers some things from the past very clearly but cannot recall other events of the same time period. He is also forgetful and sometimes, one or two hours later, will not remember what has earlier been done or said. He then becomes agitated. Later, he may however remember the incident.

14. I have also specifically observed that since his brain injury, Jerry can be very easily manipulated by others such as signing his name to something he may not fully understand. He is especially vulnerable when he is tired or frightened.

I hereby certify that the above is true and accurate to the best of my knowledge and belief.

/s/ Elaine Massey
Elaine Massey

STATE OF VIRGINIA:
AT LARGE

Sworn and subscribed to before me on this 23rd day of November, 1994.

/s/ Alexander Crump

Notary Public

My Commission Expires: 11-30-97

AFFIDAVIT AND SWORN
STATEMENT OF MRS. ROY MARTIN

Date of Birth: 12/18/29

South Boston, Virginia

My name is Mrs. Roy Martin. I have read the typed statement of my husband Roy Martin. The statement to my knowledge and from my memory of the events of that day when this individual was shot is true and accurate to the best of my knowledge and belief. I was in the house when these events happened. My husband asked me to listen to the scanner as he stated something unusual or bad was happening. My husband didn't sleep much at night and it was not unusual for him to listen to the scanner at all hours.

When I paid attention to the scanner I heard statements that some type of chase was on. I heard a statement that the subject or other car was behind the police. I heard a statement that the police were upset because they were having trouble finding him and I remember one of the officers saying that he would "fix him" when he caught him. I remember radio transmissions that clearly indicated that something very unusual happened after they stopped this person who I now know to be Mr. Lowery. I heard a police transmission that this person (Mr. Lowery) was bleeding and I recall something about they did not want to mess up their car and they needed something to protect the seat. I remember a statement that they did not want to mess up their

seat or get blood on their seat. I remember after the shooting a transmission that the two police officers involved in the shooting needed to either see or pick up or speak to a third person or officer about what happened and that they needed to get their stories straight.

I remember my husband and I speaking about this event over a period of time as we later learned (I believe a month later) of the Rodney King beating in California. In any event, we have spoken to each other about this sounding just like the Rodney King episode.

From the many years that I have also listened to the police scanner, I agree that this was the most unusual of all scanner episodes. I also remember the number 13 as one of the two police officers involved.

I agree with my husband's request that Mr. Sager do what he can to keep us from being harassed or bothered by any of the officials and police in South Boston.

I have read the above statement and have been given the opportunity to make corrections as well as to mark out things that are not accurate as well as to add other things if I recall them at this time. This statement is true and accurate to the best of my knowledge and belief.

/s/ Mrs. Roy Martin 09/28/92

Mrs. Roy Martin Date

STATE OF VIRGINIA
CITY/COUNTY OF HALIFAX

Subscribed and sworn to before me this 28th day September, 1992.

My commission expires: 5-31-1995

Floyd L. Coleman

Notary Public

AFFIDAVIT AND SWORN
STATEMENT OF ROY MARTIN

Date of Birth: 5-24-25

South Boston, Virginia

My wife and I read a news article earlier this year regarding the shooting of a man in South Boston by two police officers which happened during the early morning hours of February 1, 1991. I called a friend of mine and told him that I had heard many of the events on the police scanner that evening but that I did not want to get involved. Sometime later my friend put me in telephone contact with Mr. Rodney Sager in Richmond, Virginia although I requested that my name address and phone number not be given at that time to Mr. Sager. My wife and I both spoke with Mr. Sager and told him what we had heard over the police scanner.

I have emphysema and generally have difficulty sleeping. One of the things that I do is listen to the police scanner which I do very often. Sometime between 1:00 and 2:00 a.m. I heard police officers over the police scanner who were upset because they were having difficulty finding a certain automobile. I remember the badge numbers or code numbers that were being used by at least two of the officers as number 13 and number 9. There was another police number that ranged between 5 to 15. I remember some of the streets that I heard the officers talk about which included Webster Street,

Chalmers Street, Willow Oaks and other locations which sounded like Mineral and Watkins. I also remember the street name of Watkins which also sounded like Washington over the air. I specifically remember a call as to Ed Burton Construction where the police spotted an automobile. The messages were clear that they were chasing or looking for this suspect.

The two officers that I heard the most had voices that were familiar to me. One was a white officer and one was a black officer whose name I believe is Stovall. I remember one of the two officers stating that if and when we stop that "S.o.B." I'll fix him. I asked my wife to listen as it sounded to me as though these officers were going to rough up or beat up this other driver. After one of the officers said they would mess this person up another person on the radio said that they better put something over the seats in their automobile as they had just been cleaned. I heard some laughter. I then heard some other radio calls which sounded as though something very unusual had happened outside of the police car or near the police car. I then heard someone on the radio say that the officers needed to get their stories straight as to what happened before someone goes to the E.R. which is emergency room. Some 10 to 15 minutes later I heard another call that the injured person could not be interviewed because of his injuries.

This was the most unusual police scan broadcast I have heard over the many years I have been listening to the scanner. This is the reason that I am positive about the

statements that police officer were looking for someone and that they intended to mess him up or fix him when they caught him as well as the joke about their seats being clean and they needed to put something over the seats to keep them from being messed up after they had this person. It is clear in my mind that there was a broadcast that the officers must get their stories straight as to what happened.

My wife and I have spoken about this often as it sounds just like the Rodney King beating in California

I have read the above statement and have been given the opportunity to make corrections as well as to mark out things that are not accurate as well as to add other things if I recall them at this time. This statement is true and accurate to the best of my knowledge and belief.

I have given this statement voluntarily to Mr. Sager. Mr. Sager was put in contact with me again on Friday the 25th of September by my friend at which time Mr. Sager asked me again if I would consider being a witness as he felt justice could not be done without my testimony. At this time I told Mr. Sager that I would testify and tell my story although I did ask Mr. Sager to do what he could to either keep my name confidential or to keep the defendants from contacting me.

/s/ Roy Martin 09/28/92
Roy Martin Date

5-24-25
Date of Birth

STATE OF VIRGINIA
CITY/COUNTY OF HALIFAX

Subscribed and sworn to before me this 28th day of September, 1992.

My commission expires: 5-31-1995

Floyd L. Coleman
Notary Public

Excerpts of October 6, 1994 letter:

The Honorable Charles L. McCormick, III
Halifax County Circuit Court
Courthouse Square
Halifax, Virginia 24558

The Honorable William L. Wellons
Lunenburg Circuit Court
Courthouse
Lunenburg, Virginia 23952

Re: COMMONWEALTH V. JERRY COLE LOWERY

Dear Gentlemen:

I am in receipt of an astonishing series of letters authored by Mr. Rodney Sager. ...

....

I suggest Mr. Sager stop his unseemly whining, cut his losses in the civil case, and go on to profitable matters before he gets himself in any more trouble with Mr. Lowery or the law.

Respectfully yours,
/S/

John E. Greenbacker, Jr.
Commonwealth's Attorney

Richmond Times-Dispatch, Friday, February 7, 1992 B-5

Suit against police called frivolous

By Susan Winiecki
State staff

SOUTH BOSTON — Commonwealth Attorney John E. Greenbacker Jr. yesterday called a $15 million negligence suit against South Boston police frivolous.

As Halifax County's prosecutor, Greenbacker initially investigated the Feb. 1 shooting of Jerry C. Lowery.

Lowery was stopped for driving on a suspended license. He was sitting in a police car with Officers T.E. Redd and L.J. Stovall when the shooting occured.

Police said Lowery attacked Redd with a sharp object, cutting him on the face, and turned toward Stovall, who shot Lowery in the head.

Lowery's weapon may have been a spare key holder, according to police.

In a letter to South Boston Police Chief J.V. Simmons a few days after the incident, Greenbacker wrote, "I have determined that there is no violation of Virginia law involved in the actions of Officer L.J. Stovall. ... I know of no reason why [he] cannot be returned to duty."

The civil suit, filed in U.S. District Court last week, charges the officers with assualt and battery, negligence and civil rights violations.

According to his attorneys, Lowery is brain damaged and disabled.

"I think it's a shame that Mr. Lowery sustained brain damage as a result of a police officer shooting him," Greenbacker said. "The police officer did not act in an out-of-line fashion. ... [There was] reasonable feeling that the fellow officer and himself were confronted with deadly force."

Greenbacker said a battery charge against Lowery had to be dropped because he is not mentally competent to assist in his defense.

According to the suit, the shooting of Lowery was "without just cause or provocation."

IN THE UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

* * * * * * * * * * * * * * * * *

JERRY LOWERY,
PLAINTIFF

VERSUS

CIVIL ACTION

#92-CV-4

LARRY STOVAL, ET AL.,
DEFENDANTS

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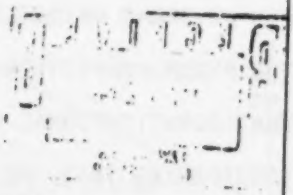
BEFORE: THE HONORABLE JACKSON L. KISER,

CHIEF DISTRICT JUDGE

MOTIONS FOR SUMMARY JUDGMENT

ROANOKE, VIRGINIA

NOVEMBER 28, 1994



CLARA L. WHITLOCK
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
ROANOKE, VIRGINIA

WITHDRAW, THE ORDERS OF JUDGE WELLONS AS TO WHAT HAPPENED AND THE FINALITY OF TWENTY-ONE (21) DAYS.

UTILITY CONTROL CORPORATION IS A CREDIBILITY CASE. IT DOES NO MORE THAN EMBODY THE CREDIBILITY INSTRUCTION THAT YOUR HONOR ROUTINELY GIVES TO JURIES. IT HAS NOTHING TO DO WITH THE MATTERS THAT WE ARE HERE TALKING ABOUT TODAY. THE SAME WE SAY WITH U. S. V. OSBOURNE. THEY JUST NEED TO BE READ. IF THEY HAVE APPLICATION, WE DON'T SEE IT.

WE BELIEVE IT IS GOVERNED BY A PRECLUSIVE EFFORT FOR MR. STOVALL. I REALLY THINK WE WERE VERY CLOSE TO GETTING SUMMARY JUDGMENT FOR MR. STOVALL LAST TIME, BUT FOR LOWERY'S VERSION. THE EFFECT OF 9/15/94 WE SAY HAS GUTTED MR. LOWERY'S VERSION AS A MATTER OF LAW AND NOT FOR JURY.

I HEAR MR. SAGER AGAIN MAKE NO REASON WHY YOUR HONOR SHOULD NOT GRANT SUMMARY JUDGMENT TO MR. REDD. THANK YOU.

THE COURT: ALL RIGHT, GENTLEMEN. MR. LOWERY'S PROCEDURES BEFORE THE CIRCUIT COURT OF HALIFAX COUNTY FRANKLY IMPRESS ME AS HE'S TRYING TO PLAY FAST AND LOOSE WITH TWO (2) COURTS. MY PRESENT FEELING IS THAT GIVEN THE WAY WE TREAT PRIOR CONVICTIONS FOR SENTENCING PURPOSES, IF THE PRIOR CONVICTION IS REPRESENTED BY COUNSEL, REGARDLESS OF WHAT CONSTITUTIONAL VIOLATIONS THE DEFENDANT MAY CLAIM IN CONSIDERING THAT, HE IS NOT AT LIBERTY TO ATTACK IT, AT LEAST

FOR SENTENCING PURPOSES. I AM MORE IMPRESSED WITH NOT JUST WITH THE PLEA OF GUILTY, BUT WITH THE COLLOQUY BETWEEN JUDGE McCORMICK AND MR. LOWERY. IT SEEMS TO ME LIKE MR. LOWERY WAS INTERROGATED IN VERY SIMPLE TERMS, ASKED TIME AND TIME AGAIN WAS HE GUILTY, WAS THAT THE REASON HE WAS PLEADING GUILTY AND HE SAID YES.

I WILL REVIEW THE MATTER AGAIN, GENTLEMEN, BUT MY PRESENT INCLINATION IS THAT I'M NOT GOING TO LET MR. LOWERY BLOW HOT AND COLD AT THE SAME TIME.

MR. SAGER: MAY I ---

THE COURT: YES, SIR.

MR. SAGER: MAY I ASK A QUESTION, YOUR HONOR? TWO (2) MATTERS. ONE (1), SINCE THE COURT IS GOING TO CONSIDER THE MATTER, WOULD THE COURT ALSO CONSIDER BRINGING MR. LOWERY BEFORE THE COURT AND QUESTIONING HIM?

THE COURT: NO, I'M NOT GOING TO TAKE ANY MORE.

MR. SAGER: ALL RIGHT. THE OTHER ITEM, YOUR HONOR, IS WE STILL HAVE A MATTER WHERE A LAWFUL PROFFER BY THIS COURT WAS ISSUED TO MR. GREENBACKER ---

THE COURT: THE ONLY THING I CAN TELL YOU IS IF THERE IS SOME PROBLEM WITH IT, BRING IT ON FOR HEARING.

MR. SAGER: WELL, I'VE NOTICED IT AND I NEED A DATE.

THE COURT: GET IN TOUCH WITH MR. GOLIGHTLY. HOW DID YOU NOTICE IT WITHOUT A DATE?

MR. SAGER: NO, SIR. I JUST SIMPLY SAID I'M GOING TO

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UNITED STATES DISTRICT COURT
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VIRGINIA: IN THE CIRCUIT COURT OF HALIFAX COUNTY

COMMONWEALTH OF VIRGINIA

V.

JERRY COLE LOWERY

Filed - 9/15/94 J.

STATEMENTS OF FACT

1. I know my rights and understand them.

2. I am now competent to stand trial, and to assist my lawyers in the defense of this case.

3. I was selling cocaine in South boston before my arrest and the cocaine I had with me when the officers arrested me was possessed by me for later sale.

4. On February 1, 1991 when I was arrested, I cut Officer Thomas E. Redd on the face with a metal key holder because I wanted to escape custody. I knew he would find my cocaine. I intended to maim and disable him and at the time Officer Stovall shot me I was intending to kill Redd if I had to to get away.

5. Since my release from the hospital, I have faked not being able to understand the proceedings against me to help my defense and the civil suit filed on my behalf against the South Boston police.

6. I have discussed this thoroughly with my attorney Mr. Crowder, including the implications of this plea for my civil case. Having considered all of this I believe it is in my best interest to proceed.

7. I have delayed pleading guilty because of the pendency of the civil suit I filed for my injuries in this episode. At all times I was guilty of these charges, and I knew I was.

8. I understand that the Commonwealth will recommend that I serve two years of a ten year sentence on the charges of ~~unlawful~~ malicious wounding of an officer and possession of cocaine with the intent to distribute which are now pending against me, and that those sentences should run concurrently with each other. No other promises have been made to me, and no persons have forced me to enter these pleas.

Jerry Lowery

EXHIBIT 1

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9. By entering these pleas I give up my trial rights, especially my right to a jury trial, the right to confront my accusers and hear the evidence against me, and my right to appeal this case.

10. I have discussed all of this with my lawyer Mr. Crowder and I am fully satisfied with his assistance in this case.

Jerry Cole Lowery
Jerry Cole Lowery

Witness:

Charles H. Crowder, III
Charles H. Crowder, III

John E. Greenbacker, Jr.
Commonwealth's Attorney

A Copy Teste: L. W. Conner
Circuit Court Halifax Co., Va.

Affidavit

I Jerry Cole Lowery hereby aver that the foregoing Statements of Facts is true and correct to the best of my knowledge and belief.

Jerry C. Lowery
Jerry Cole Lowery

Sworn and subscribed before me this 15th day of September, 1994.

Lisa M. Englebright
Notary Public

My commission expires: December 31, 1996

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Skull fracture
Entrance of bullet
Hematomas
Multiple bullet fragments found anterior to bullet entry
Trachea
Large bullet fragment
Esophagus
C6
C7
Vertebral arteries
Large bullet fragment
Spasms of the int. & ext. carotid arteries
Injured cranial nerves
XII
VIII
IX
X
XI
XII

A-100

A-101